No. 2711.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MILLER & LUX INCORPORATED, a Corporation,

Plaintiff in Error,

vs.

SAVERIO DI GIOVANNI PETROCELLI, as Administrator of the Estate of Pietro Spina, sometimes known as Peter Spino, deceased,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

This is an ordinary common-law action to recover damages for death by wrongful act: the facts were fully developed: the charge was full and impartial: the rights of both sides were protected: two juries have determined the issues in favor of the plaintiff below; and no substantial reason appears to justify a finding of any reversible error.

The object of this action is to recover compensation for the death of Pietro Spina, sometimes known as Peter Spino, and the cause of action was grounded upon the negligence of the defendant. The action

was originally brought in the State Court by one G. E. Nordgren, who was the Public Administrator of the County of Merced in the State of California, and who was, at the time of the commencement of the action, the administrator of the estate of the deceased (Record, pp. 6-9). Subsequently, the cause was removed to the United States District Court for the Southern District of California, Southern Division.

In the meantime, by appropriate proceedings in the Superior Court of Merced County, sitting in probate, the letters of administration formerly issued to Nordgren were revoked, and the present plaintiff substituted as administrator in his stead (Plaintiff's Exhibit "A," probate record (Record, pp. 56-84). Thereupon, by an order of Hon. Olin Wellborn, then Judge of the court below, the present plaintiff was substituted for the former plaintiff Nordgren, and the present counsel substituted for those who represented Mr. Nordgren (Record, pp. 14-5).

It is correct, as stated by the plaintiff in error at p. 2 of its brief in this cause that "a demurrer to the original complaint was sustained": but that demurrer was sustained by stipulation, after the cause had been removed to the Federal Court, and by this stipulation time was given to the plaintiff below, now defendant in error, within which to file an amended complaint; and upon this stipulation, an appropriate order was made by the then Judge of the court below (Record, 15-17). It is further stated in the brief of plaintiff

in error, at p. 2, that "Later the court substituted as "plaintiff Saverio di Giovanni Petrocelli, as adminis- "trator of the Estate of Pietro Spina, sometimes "known as Peter Spino": but this statement is a mistake, the facts being that the "Certified Transcript of Record on Removal from Superior Court of Merced County" was filed in the lower Court on September 14, 1912, the order of substitution above referred to was filed on March 3rd, 1913, and the stipulation above referred to was entered into on April 30th, 1913, and the order made upon that stipulation was filed on May 5, 1913 (Record, pp. 13, 15, 16, 17). The Amended Complaint, prepared pursuant to said stipulation, was filed on July 17, 1913 (Record, p. 25, where the year is erroneously printed as "1912": (see jurat, top p. 24), and the Answer was filed on July 28, 1913 (Record, p. 30). In other words, not only is it the fact that "The defendant caused the "case to be removed into the United States District "Court" (Brief for plaintiff in error, p. 1), but all of the subsequent proceedings, including the two trials, took place after such removal, and took place without any suggestion whatever from defendant that there was anything irregular or improper in its own handiwork. It is to be noted that, on page 25, line 4 of the Record, a typographical error appears in the statement "filed Jul. 17, 1912": this should read, "Filed, Jul. 17, 1913." And so, on page 30, line 8,

of the Record, the words and figures "of July 1915" should read "of July 1913."

The Amended Complaint, after alleging the corporate character of the defendant, showed that on July 1, 1912, the deceased died at Midway Camp or Ranch, premises owned, occupied, controlled and operated by the defendant; and that ever since February 17, 1913, the plaintiff has been administrator of the estate of the deceased. It next appears that the deceased was about 35 years of age, married, and left as his sole heirs-at-law his wife and his minor daughter: that he had no other source of income except the wages he earned as a farm laborer: that at all times prior to his death, his wife and daughter were dependent upon him and his earnings for their support, and that he was dependent upon his wages for the support of his wife, his child and himself: and that his average earnings were $100 a month, out of which he contributed about $50.00 per month to the support of his wife and child—a support of which his death deprived them. The circumstances of the death are then described. It appeared that on July 1, 1912, the defendant was harvesting a crop at Midway Camp aforesaid, and the deceased was there engaged in the employ of the defendant in driving a thirty-two-mule-team harvester, used in harvesting this crop. At the same time, one Twining was employed by the defendant to attend the harvester and record the sacks as they came from it; and at the time of the death,

July 1, 1912, Twining was actually engaged in this employment. To enable Twining to perform his duties, the defendant furnished him a horse, which, to defendant's knowledge, was a restive, fractious, vicious, frisky animal, not easily controlled, liable to run away, and a dangerous animal with which to approach the harvester team because of its frightening the mules; and at the time of the death, the defendant carelessly and negligently caused and permitted Twining, for the purpose of counting and recording the sacks coming from the harvester, to approach, and Twining did approach, the harvester team with this dangerous and frightening horse, without any effort to manage, restrain, control or quiet the horse, and without taking any precautions in the care and driving of the horse to avoid frightening the harvester team. By reason of this, the horse did frighten the harvester team, which ran away, whereby the deceased was violently thrown to the ground from his seat and run over and killed by the harvester. The amended complaint then assembles the particulars in which the defendant was negligent as follows:

1. Neglect to take reasonable precautions to protect deceased.
2. Neglect to supply and provide proper, adequate and safe appliances and instrumentalities for the conduct of its operations.
3. Neglect to provide the deceased with a safe place of work.

4. Causing and permitting Twining to use said dangerous and frightening horse.
5. Neglecting to provide Twining with such a safe and gentle horse as would enable him to approach the harvester team without frightening it.

The allegations of damage then follow, together with the prayer for judgment.

The brief of defendant in error states that "the "amended complaint does not allege the citizenship "of either the plaintiff or the heirs on whose behalf "the suit was brought,"—just as if the action had originally been commenced in a Federal Court, or just as if the plaintiff below, instead of the defendant below, had, upon his voluntary initiative, caused the removal to the Federal Court: but the plaintiff below was not responsible for the removal: in that proceeding, the defendant below was the actor; and after having brought about this removal, the defendant below signed a stipulation providing for an amended complaint, accepted service of a copy of that amended complaint (24), and without demurring filed an answer to the merits which failed to tender any plea in abatement, or to the jurisdiction (*Hartog* v. *Memory,* 116 U. S., 588), or to suggest in the remotest way the objection now urged for the first time. It was wholly unnecessary to allege diversity of citizenship in the original complaint in the State Court, and the controversy was drawn within the Federal Court

at the instigation of the defendant below: both the original (8) and the Amended Complaint (19) showed the dead man's wife and child to have been residents of Italy; and if, in a case transferred to a Federal Court upon the application of defendant, it were necessary to set up diverse citizenship, if in such a case the defendant could be heard to complain of the absence of such an allegation, and if the objection had been plainly, clearly, specifically and promptly made at the time, it could readily have been obviated because "Jovetta Spina and Sunda Spina were subjects of the Kingdom of Italy" (Brief for plaintiff in error, p. 49): but no such objection was made, and we submit that it cannot now be raised for the first time in this Appellate Court.

The answer in the case, though brief, is not without certain interesting characteristics. It makes no denial of the first paragraph of the amended complaint, which sets forth the corporate character of the defendant; and indeed nothing appears anywhere throughout the record to indicate that any issue was made upon this subject matter. The answer then declares that the defendant has no information or belief to enable it to answer the allegations of paragraph II of the Amended Complaint, but it quite fails to deny all of the allegations of that paragraph. The answer does deny that by due or proper proceedings in the matter of the estate of Pietro Spina, sometimes known as Peter Spino, the present plaintiff was, by the Su-

perior Court of Merced County, appointed administrator of the estate of the deceased; and it further denies, for lack of information or belief, that the plaintiff qualified as such administrator as required by law, that letters of administration were issued to him, or that he has been or still is the duly appointed, qualified and acting administrator of the estate of the deceased; and it will thus be observed that by these denials an issue was raised by the defendant, to which issue the probate record (Record, 55-84), so unpleasant to defendant (Assignment of Error VI), was plainly responsive and relevant. But this answer, it will further be observed, nowhere attempts to deny "that on or about the first day of July, A. D. 1912, "upon premises owned, occupied, controlled and op- "erated by said defendant, in the County of Merced, "in the State of California, the above named Pietro "Spina, sometimes known as Peter Spino, died"; and these facts may therefore be regarded as unquestioned.

The answer then alleges that the defendant has no information or belief to enable it to answer the allegations of paragraph III of the amended complaint: but it does not deny all of the allegations of that paragraph. It does deny that the deceased was 35 years old at his death, that he was married, and that he left as sole heirs-at-law his wife and daughter; it also denies the dependence of the wife and daughter for support upon his earnings; and it also denies that his average earnings exceeded $50 per month, that he con-

tributed $50 per month to the support of his wife and child and that his death deprived the wife and daughter of his support. But this paragraph of the answer does not deny "that for a long time prior to " and at his said death, said decedent had been a farm " laborer by occupation and had no other source of " income except the wages earned by him in his said " occupation"; nor does it deny "that during all the " times prior to and at his said death, said deceased was " without independent means or fortune, and was de- " pendent for his support and maintenance, and the sup- " port and maintenance of his said wife and daughter, " upon his said wages earned in his said occupation " of laborer"; and these matters may also, we think, be regarded as unquestioned. It should, however, further be observed that this paragraph of the answer " denies that said decedent contributed to the support " and maintenance of his wife and child in the sum " of fifty (50) dollars for each and every month": but is not this negative plainly pregnant with the admission that he contributed in the sum of $49.99/100 for each and every month?

The next paragraph of the answer takes up the fatal occurrence and makes sundry denials concerning it: but these denials leave uncontested many of the facts alleged by the plaintiff. Thus, the following facts are nowhere denied:

> "Prior to and on said first day of July, 1912, " said defendant owned, occupied, controlled and " operated said Midway Camp or Ranch, and was

"engaged in harvesting a crop thereon; during said "time, and on said first day of July, 1912, said "decedent was employed by said defendant to "drive, and was then and there actually engaged in "driving for said defendant, a certain harvester "team composed of about 32 mules, and then and "there used in the aforesaid harvesting of the "aforesaid crop; during said times, and on said "first day of July, 1912, one Twining was em- "ployed by said defendant to follow and attend "said harvester and count and record the sacks as "they came from said harvester, and on said first "day of July, 1912, said Twining was actually en- "gaged in his said employment, and, for the pur- "pose of enabling said Twining to perform the "duties of his said employment, said defendant "furnished him with a horse for use in that re- "gard" (Record, pp. 20-21).

And in addition to this, the fact of the runaway of the mule team; the fact that the deceased was *thrown,* and the fact that he was killed, cannot, we think, be regarded as denied or contested facts by anyone who reads this language:

"But on the contrary the said defendant alleges "that said team ran away and the said decedent "was *thrown* and killed without any carelessness or "negligence by the said defendant of any kind or "character whatsoever" (Record, pp. 27-8).

The remaining paragraphs of the answer deny the particulars of the negligence charged, deny the damage to the wife and daughter, and deny that the action is prosecuted in their behalf.

The answer then proceeds to set up, "as a further,

"separate and distinct defense," the contributory negligence of the deceased, charging the deceased with losing control of the team, and that he "negligently "and carelessly dropped or fell" from the harvester, thus receiving the injuries which caused his death. Of this portion of the answer, it is, we think, to be observed that it really admits that the mule team became frightened, that it ran, that the deceased did not continue in the harvester, that he received injuries and that those injuries caused his death. It will be observed that we are careful to use the cautious phrase "that deceased did not continue in the harvester," and we do so advisedly: because on page 28, line 2 of the Record, we are told by the answer that "said dece- "dent was *thrown,*" but on page 29, line 19, we learn that he "negligently and carelessly *dropped or fell.*" And while upon this subject of contributory negligence, it may as well be suggested here as elsewhere that the allegation of contributory negligence, is in its nature, a plea in confession and avoidance, being predicated upon the existence of negligence upon the part of the defendant, the responsibility for which the defendant seeks to avoid by charging contributory negligence upon the part of the person injured or killed. In other words, contributory negligence upon the part of the plaintiff, necessarily presupposes negligence upon the part of the defendant; and the fol-

lowing are some of the authorities which support this view:

Watkinds v. *S. P. Co.*, 38 Fed., 711;
Crabbe v. *Mammoth Mg. Co.*, 168 Cal., 500;
McCarthy v. *Louisville Ry.*, 14 So. (Ala.), 370;
Louisville Ry. v. *Sights*, 89 S. W. (Ky.), 132;
Scott v. *Seaboard Ry.*, 45 S. E. (S. Car.), 129;
Jones v. *Charleston Ry.*, 39 Id., 758;
Simms v. *S. C. Ry.*, 2 Id., 486;
Hummer v. *Ry.*, 108 S. W. (Ky.), 885;
Ry. Co. v. *Tippett*, 142 S. W. (Ark.), 520;
American v. *Spiss*, 117 Ill. App., 436;
Lime Co. v. *Affleck*, 79 S. E. (Va.), 1054.

The cause being thus at issue, it "came on for trial "on the 7th day of May, 1914, before the Court, "Hon. Edward S. Farrington presiding, and a jury, "and resulted in a verdict in favor of plaintiff for "the sum of five thousand (5000) dollars; that there- "after the defendant duly made a motion for a new "trial; and said court thereafter made its order set- "ting aside its verdict and granting a new trial of "said action" (Record, 34-5). Thereafter, on May 17, 1915, the cause came on for its second trial before Hon. Oscar A. Trippet and a jury.

Rule 22 of the rules of practice of the United States District Court for the Southern District of California, provides as follows:

"Rule 22. Bills of Exceptions to Charge of Court, When and How Made.—The party except-

ing to Charge of the Court, to the jury must specify distinctly the several matters of law in the charge to which he excepts. Such matters of law, only, will be inserted in the bill of exceptions, and allowed by the Court. All exceptions to the charge of the Court to the jury shall be specified in writing immediately on the conclusion of the charge, and handed to the Court before the jury leave the box. The bill of exceptions must be prepared in form, and presented to the Judge within ten days after verdict, and in default thereof, the exceptions will be deemed waived."

From a statement by the learned Judge of the court below, which statement was inserted by the learned Judge in the bill of exceptions, which statement dealt with the matter of exceptions to the instructions given, asked and refused on this second trial, and which statement will be the subject of discussion hereafter, the following appears:

"All the foregoing exceptions as to instructions "given, asked and refused, are allowed under the fol- "lowing circumstances, to wit: Rule 22 of the United "States District Court for the Southern District of "California, was not followed as it is written. No ex- "ceptions were noted before the jury left the box to "consider of their verdict, but the following did "occur at the trial: The following stipulation was "entered into in open court at the suggestion of the "Judge with regard to the taking of exceptions:

"THE COURT—Better have a stipulation here

" that the rule obtaining in the State Court shall apply " here, in regard to exceptions.

"MR. TREADWELL—I think so.

"MR. DUNNE—Then it may be stipulated that it " is not necessary for either side to take any exceptions " in the course of this trial to any ruling which may " be made by his Honor" (Rep. Trans., p. 22).

"After the Court charged the jury, and while the " jury was still in the box, the following stipulation " was entered into in open court at the suggestion " of the Court with regard to the taking of excep- " tions to the giving of its instructions and refusal of " instructions requested:

"THE COURT—The rule of court requiring ex- " ceptions to be noted at the time—it is generally the " practice to waive that and allow the exceptions to " be taken at a subsequent time. Will you stipulate " that may be done?

"MR. DUNNE—Yes, your Honor, if it is agree- " able to counsel on the other side.

"MR. SHORT—Yes" (Rep. Trans., p. 134).

"After the testimony was closed and the opening " argument made to the jury by counsel for plaintiff, " and before the argument by counsel for defendant, " the following occurred at the trial:

"MR. TREADWELL—If your Honor please, un- " der the peculiar practice of this Court, in addition " to the motion for a nonsuit, it is necessary to make " a motion, on the same grounds, to direct the ver-

" dict. I want the record to show that we made that " motion.

"THE COURT—All right" (Rep. Trans., p. 125).

"The Court is of the opinion that the plaintiff " stipulated as shown by the foregoing, that the ex- " ceptions could be noted as taken and shown in the " bill of exceptions; that this stipulation was not " only between the parties, but that the Court was " a party to it; that said stipulations were made in " the presence of the jury and before the jury retired " from the box to consider of their verdict; that said " stipulations had the force and effect of exceptions " noted, as required by Rule 22, in the presence of " the jury; that the requirement of Rule 22, or the " Statute of Westminster II, not being a constitutional " requirement, could be waived by stipulation and " estoppel. The defendant objects to the insertion " in the bill of exceptions of this statement containing " said stipulations, and insists that the bill of excep- " tions should be settled and the exceptions shown " without this statement. The plaintiff desires to with- " draw from said stipulations, and to have said ex- " ceptions stricken out of the bill of exceptions, and " the bill to state exactly what was done. The Court " is of the opinion that it is in duty bound to allow " said exceptions as aforesaid, and as noted in the " bill, but to state the exact facts in the bill of ex- " ceptions, as to what occurred. The Court is of the " opinion that all the elements of an equitable estop-

" pel are present here, even if the plaintiff is not " bound by said stipulations. So far as the trial court " is concerned, the plaintiff is not permitted to with- " draw from said stipulation. The objection of the " defendant to the insertion of this statement in the " bill of exceptions is overruled, and an exception is " allowed the defendant to this ruling of the Court" (Record, p. 128, line 30 to p. 131, line 11).

This second trial resulted in a verdict in favor of the plaintiff, and again for the sum of $5000. In accordance with this verdict, judgment was entered on May 18, 1915; and thereafter, the writ of error was sued out which removed the cause to this court.

On pages 2-3 of the brief for plaintiff in error herein reference is made to what it has pleased plaintiff in error to describe as "the three claims of negli- " gence . . . . alleged in the complaint." We respectfully protest against this statement of the defendant, and we point to our amended complaint for the charges of negligence which we make against this defendant. In paragraph IV of that complaint, we claim that the horse which confessedly the defendant furnished to Twining was, not solely a "vicious" horse, but was "a restive, fractious, vicious, frisky ani- " mal, not easily controlled, liable to run away, and a " dangerous animal with which to approach said har- " vester team because of its frightening said mules." And in the same paragraph, the plaintiff further complains that in approaching the harvester team with

this dangerous and frightening horse, the boy Twining did so "without any effort to manage, restrain, "control or quiet said horse, and failed and neglected "to take any precautions in the care and driving of "said horse to avoid the frightening of said harvester "team." And in paragraph V of said complaint, the plaintiff charges "negligence of defendant in failing "and neglecting to take reasonable and proper pre-"cautions to protect said defendant," and "negligence "of defendant in failing and neglecting to supply "and provide proper, adequate and safe appliances "and instrumentalities for the conduct of its opera-"tions," and "negligence of defendant in failing and "neglecting to provide said decedent with a safe "place of work," and "negligence of defendant in "causing and permitting said Twining to use said "dangerous and frightening horse," and "negligence "of defendant in failing and neglecting to provide "said Twining with such a safe and gentle horse as "would enable him to approach said harvester team "without frightening it." In view of these various specific charges of negligence, insistence upon no one of which is in any wise abated by us, we feel that we have a right to protest against the attempted enumeration of charges of negligence contained in our opponent's brief.

And we may add here that the Roseberry compensation law seems to have attracted the attention of the plaintiff in error: it is referred to on pages 3, 6,

53-7, and 59-60 of its brief; and when we discuss the Twelfth assignment of error, we shall state our views concerning it.

THE ASSIGNMENT OF ERRORS.

The Assignments of alleged error are vague, general, indefinite, unspecific, lacking in particularity, and without foundation in the Bill of Exceptions: they attempt to supply deficiencies in the record below, and to import new matter into the record here; and for these reasons, they should be disregarded, the writ of error dismissed, and the judgment affirmed.

In approaching the consideration of this cause, we respectfully insist that very many, indeed, of the assignments of error cannot be considered; and if we are correct about this, the scope of the inquiry upon this writ of error will become very much restricted. The settled rule is that the judgment of the Court below will be taken to be correct, that an Appellate Court cannot presume error, that error (if any), must appear affirmatively before there can be a reversal, and that it is not sufficient to produce a record from which it does not affirmatively appear whether the judgment below was right or wrong (*Townsend* v. *Jemison,* 48 U. S. (7 How.), 706; *Simpson* v. *Baker,* 67 Id. (2 Black.), 581; *Cliquot* v. *U. S.,* 70 Id. (3 Wall.), 114; *Boley* v. *Griswold,* 87 Id. (20 Wall.), 486; *Loring* v. *Frue,* 104 Id., 223); and this principle has been applied to pleadings (*Garnhart* v. *U. S.,* 83 U. S. (16 Wall.), 162), and to the legality of the

evidence upon which a verdict was based (*Penn. Co.* v. *Roy,* 102 U. S., 451), and to the admission of evidence (*Murray* v. *Louisiana,* 163 U. S., 101), and to the exclusion of evidence (*Penn. Ry.* v. *Stimpson,* 39 U. S. (14 Pet.), 448), and to the sufficiency of the evidence to sustain the judgment (*Thompson* v. *Ferry,* 180 U. S., 484), and to the correctness of the instructions (*Wiggins* v. *Burkham,* 77 U. S. (10 Wall.), 129; *Corinne, etc. Co.* v. *Johnson,* 156 Id., 574)—even to the extent that where the record does not contain all the instructions, it is to be assumed that any others needed were given (*Bennett* v. *Harkrader,* 158 U. S., 441), and to the propriety of the verdict (*Gregory* v. *Morris,* 96 U. S., 619). In a word, the judgment of the court below is a valuable property right of the plaintiff, and he is entitled to have it remain unimpaired except by strictly legal means (*Johnson* v. *Gebhauer,* 159 Ind., 271; *Livingston* v. *Livingston,* 173 N. Y., 377).

From this consideration, there follows the equally well settled rule, that upon a writ of error, no assignment of error can be considered which fails to comply with the rules, or which fails to rest upon a foundation visible in the bill of exceptions. The controlling rule here is rule 11 of the rules of the Circuit Court of Appeals, which, similarly to rule 35 of the rules of the Supreme Court, requires that each assignment of error shall set out, not only separately, but also *particularly,* each error asserted and *intended to be*

urged. We submit, however, that this rule cannot be complied with by filing assignments so vague, obscure and indefinite that they are mere generalities; and we submit that assignments which do not state the concrete particulars, which could not withstand a demurrer for uncertainty, if they were allegations in a pleading, and which leave court and counsel to grope in the dark for some clue to the meaning, do not satisfy a rule which requires that each error intended to be urged shall be *"particularly"* set out.

We believe that the rule that an assignment of error should be so specific that the understanding and attention of the court are at once arrested and directed to the particular error intended to be urged, without being forced to search the record to determine it, and that indefinite and general assignments will not be noticed, is fully sustained, not only by the rule, but also by the adjudications:

Great Creek Coal Co. v. *Farmers L. & T. Co.,* 63 Fed., 891, 894:

No "looking beyond."

Van Gunden v. *Va. C. & I. Co.,* 52 Id., 838, 840:

No "looking beyond."

Woodbury v. *Shaneetown,* 74 Id., 205, 206:

Specification *proves* nothing.

Fla. etc. Ry. v. *Cutting,* 68 Id., 586, 587:

General assignments condemned.

U. S. v. *Ferguson,* 78 Id., 103, 105:

General assignments condemned.

Western Coal Co. v. *Ingraham,* 70 Id., 219, 222:

Duty to ask directed verdict at the close of the whole evidence, if no evidence of negligence presented.

Doe v. *Waterloo Mg. Co.,* 70 Id., 455, 461:

General assignments not aided by the brief.

Haldene v. *U. S.,* 69 Id., 819, 821:

Indefinite specifications bad.

Crosby v. *Emerson,* 142 Id., 713, 719:

Indefinite specifications bad.

City of Lincoln v. *Sun Vapor Co.,* 59 Id., 756, 759:

Errors must be distinctly specified.

Piper v. *Cashell,* 122 Id., 616:

Particular specifications necessary.

Esterly v. *Rua,* 122 Id., 609:

Particular specification necessary.

W. U. Tel. Co. v. *Winland,* 182 Id., 494:

Indefinite assignment bad.

Deering Harvester Co. v. *Kelly,* 103 Id., 262:

General assignments not noticed.

The Myrtie M. Ross, 160 Id., 19:

General assignments not noticed.

Garrett v. *Pope Motor Car Co.,* 168 Id., 905:

General assignments not noticed.

In addition to this, how can any assignment be considered for which no foundation was laid in the bill of exceptions? The function of an assignment of errors is not to import into a record some alleged error which does not appear in the bill of exceptions: the assignment of errors can be no broader than the bill of exceptions; and as Mr. Foster puts it: "The "assignment of errors cannot supply an omitted ex- "ception" (3 *Foster Fed. Pr. Last Ed.,* p. 2478, n. 5). For this reason, it was held in *Tucker* v. *U. S.,* 151 U. S., 164, 170, that "the other instructions to which "the defendant objected are not subject to review, "because the bill of exceptions does not show that "he excepted to them." And so, likewise, in *Lindsay* v. *Turner,* 156 U. S., 208, it was held that where errors are assigned to portions of the charge to the jury, but no exceptions are preserved thereto, no questions are raised for the consideration of the Appellate Court thereon. It is both good law and good sense that neither a petition for a writ of error, nor an assignment of errors, can "supply deficiencies" in the record of the court below (*Harding* v. *Illinois,* 196 U. S., 28), nor can the assignment of errors "bring into the record any new matter for . . .

"consideration" (*Waters-Pierce Oil Company* v. *Texas,* 212 U. S., 112, 115-6),—you cannot raise a new issue by an assignment of error (*Davis* v. *McEwen Bros.,* 193 Fed., 305).

Since, therefore, the basis and foundation for the assignment of errors is to be discovered, if at all, in the bill of exceptions, it may be proper to remark that the time and manner of taking exceptions and filing bills of exceptions are matters as to which the Federal Courts act independently of state statute and practice (2 *Foster Fed. Prac.,* page 1588, sec. 479; *Ex parte Chateaugay Iron Co.,* 128 U. S., 544; *Fishburn* v. *Chicago, etc. Ry.,* 137 Id., 60); and also to point out that, in the Federal Courts, not only must the grounds of the objection be stated, but in the event of an adverse ruling upon an objection, or in the event of any action by the court deemed to be adverse to complaining party, a proper exception, taken promptly at the time, is indispensable to a review of the disputed matter by the appellate court; and if no such exception be taken, no review can be had in the Appellate Court, and by consequence the action or matter complained of has no place in the bill of exceptions or the assignment of errors, any state statute or any state practice to the contrary notwithstanding. This proposition is fully supported by the following authorities among others:

Laber v. *Cooper,* 74 U. S. (7 Wall.), 565:

objection must be made at trial;

N. H. Co. v. *Pace,* 158 U. S., 36:
necessity of exception;

Tabor v. *Bank,* 62 Fed., 383:
objection and its grounds;

Potter v. *U. S.,* 122 Id., 49, 55:
exception indispensable;

Thomas China Co. v. *C. W. Raymond Co.,* 135 Id., 25:
objection must be stated at trial;

Prioleau v. *U. S.,* 143 Id., 320:
exception necessary;

Fidelity & Casualty Co. v. *Thompson,* 154 Id., 484, 485:
exception must be reserved;

Robinson v. *Denver City Tramway Co.,* 164 Id., 174, 176:
failure to except fatal;

American S. & F. Co. v. *Karapa,* 173 Id., 607, 608, 609:
exception indispensable;

Chicago etc. Ry. v. *Frye-Bruhn Co.,* 184 Id., 15, 18:
exception indispensable to review;

Gibson v. *Luther,* 196 Id., 203, 205:

without proper exception, nothing for review by appellate court;

Board of Com'rs. v. *Home Savings Bank,* 200 Id., 28, 35:

exception indispensable.

We take the liberty of inserting here a typical quotation from the case last cited:

> "The office of an exception, in practice, is to "challenge the correctness of the rulings or decisions "of the trial court promptly when made, to the "end that errors in such rulings may be corrected "by the court itself, if, upon its attention being "called thereto, it deems them to be erroneous; "and to lay the foundation for their review, if "necessary, by the proper appellate tribunal. In "the courts of the United States such an exception, "taken immediately upon the ruling being made, is "indispensable to a review by the proper appel-"late court of the ruling."

We remarked above that objections and exceptions must be made and taken at the trial: and in this connection, we wish to urge that exceptions must not only be promptly taken at the time, responsively to a legally adequate objection, but objections made or exceptions taken after the jury shall have retired, cannot be con-

sidered; and in support of this proposition, the following authorities may be referred to:

Klaw v. *Life Pub. Co.* 145 Fed., 184: Second Circuit:

"The practice of undertaking to reserve excep-
" tions after the jury has retired, has been con-
" demned by the Supreme Court."

Mann v. *Dempster,* 179 Fed., 837: Second Circuit:

Rule enforced.

Mann v. *Dempster,* 181 Fed., 76: Second Circuit:

Enforcing the rule although the adversary consented to have the exceptions considered.

Starr Co. v. *Madden,* 188 Fed., 910: Second Circuit:

Holding that the record must show that the exceptions were reserved while the jury were at the bar.

But, in none of the Circuit Courts of Appeal has this rule been enforced more consistently than in this:

W. U. Tel. Co. v. *Baker,* 85 Fed., 690: Ninth Circuit:

Applying the rule even where by the practice and rulings of the Trial Court such exceptions were not allowed to be taken in the presence of the jury.

Mount. Copper Co. v. *Van Buren,* 133 Fed., 1: Ninth Circuit:

Applying the rule even though the court offered to have the records show that the exceptions were re-

served in the presence of the jury, and emphasizing the necessity of enforcing the rule.

Copper River Co. v. *Heney,* 211 Fed., 459: Ninth Circuit:

Holding that exceptions not only to the instructions given, but also to the refusal of requests for instructions, taken after the verdict has been returned, are unavailing.

Beatson Copper Co. v. *Pedrin,* 217 Fed., 43: Ninth Circuit:

Rule stated and enforced although counsel stipulated, in the presence of court and jury, before the jury retired, that the exceptions might be reserved at a later date.

With these principles in mind, let us examine the assignment of errors in the case at bar. The first of these assignments purports to be directed to a question which we are unable to find in the bill of exceptions. We cannot assume that the question quoted in this assignment is the same question which appears a little below the middle of page 39 of the Record; and this, for two reasons, first, because the language of the two questions is quite different; and secondly, because the difference in the language of the questions is accentuated by the difference in the objections made to the two questions. On the one hand, the bill of exceptions does not disclose the question

quoted in assignment number 1; and, on the other hand, assignment number 1 does not predicate or assign any alleged error upon the question which appears in the bill of exceptions; and consequently, we think, either way assignment number 1 is bad. And even if we were to go the length of assuming the identity of these two questions, notwithstanding their differences, still, that would not assist the plaintiff in error. Errors not assigned, will not be considered (*Russell* v. *Huntington Bank,* 162 Fed., 868; *N. Y. L. I. Co.* v. *Rankin,* Id., 103), and rulings are not reviewable if not assigned as error (*Bell* v. *U. P. Ry.,* 194 Fed., 366); and therefore, since the assignment of errors is the assignment of the errors "intended to be urged" (Rule 11), since the assignment in question abandons all grounds of objection except "immateriality," and since "immateriality" as a ground of objection is meaningless and of no legal value, it follows, we think, that no proper foundation for this assignment of error, number 1, anywhere exists.

It may just as well be urged here as elsewhere upon the attention of the court that where no ground of objection to testimony is set forth, the objection is unavailing (*Toplitz* v. *Hedden,* 146 U. S., 252): vague objections to testimony are without weight before an Appellate Court, because they should point out some specific defect, and because the objector is confined to his specific objection (*Dist. Col.* v. *Woodbury,* 136 U. S., 450; *Moore* v. *Bank,* 38 Id. (13

Pet.), 302; *Woodbury Co.* v. *Keith,* 101 Id., 479); and where the party claiming injury specifies his objection, it must be considered that all others are waived, or that there was no ground upon which the others could stand (*Evanston* v. *Gunn,* 99 U. S., 660). From these views, we submit that it follows that "such a general dragnet as 'incompetent, irrelevant "and immaterial'" (*Sigafus* v. *Porter,* 84 Fed., 430, 435), must be condemned as bad for failure to specify "wherein or how, or why" (per Dunne, C. J., in *Rush* v. *French,* 25 Pac. (Ariz.), 816), and as being "a specimen of a practice not to be encouraged, which "is to object with a rattle of words that conceal the "real nature of an objection capable of being re-"moved on the spot, and to announce its true char-"acter for the first time in the Appellate Court" (*N. Y. etc. Co.* v. *Blair,* 79 Fed., 896). And in condemning the objection "immaterial, irrelevant and incompetent" as unspecific and inadequate to raise any issue, Mr. Justice Field said:

> "The objection to the introduction of the arti-"cles of incorporation at the trial was that they "were 'immaterial, irrelevant, and incompetent' "evidence. The specific objection now urged, that "they were not sufficiently authenticated to be "admitted in evidence, and that the certificates "were made by deputy officers, is one which the "general objection does not include. Had it been "taken at the trial and deemed tenable, it might "have been obviated by other proof of the corpo-"rate existence of the plaintiff or by new certifi-"cates to the articles of incorporation. The rule is

"universal, that where an objection is so general "as not to indicate the specific grounds upon which "it is made, it is unavailing on appeal, unless it be "of such a character that it could not have been "obviated at the trial. The authorities on this "point are all one way. Objections to the admis- "sion of evidence must be of such a specific char- "acter as to indicate distinctly the grounds upon "which the party relies, so as to give the other side "full opportunity to obviate them at the time, if "under any circumstances that can be done."

Noonan v. *Caledonia Gold Min. Co.,* 121 U. S., 393, 400.

And in further support of these views see:

Patrick v. *Graham,* 132 U. S., 627, 629;
Dist. Col. v. *Woodbury,* 136 Id., 450, 462;
Toplitz v. *Hedden,* 146 Id., 252, 255;
Chicago Ry. v. *De Clou,* 124 Fed., 142;
Guarantee Co. v. *Phoenix Ins. Co.,* Id., 170;
Davidson S. S. Co. v. *U. S.,* 142 Id., 315;
Shandrew v. *Chicago Ry.,* Id., 320, 321-2;
Sparks v. *Territory,* 146 Id., 371;
Am. Car. Co. v. *Brinkman,* Id., 712.

In *Burton* v. *Driggs,* 87 U. S., (20 Wall.), 125, it is said "that it is a rule of law that when a party "excepts to the admission of evidence, he must state "the specific objections, or it cannot be made the basis "of error"; and it must further appear that the objections assigned were assigned in the court below and seasonable exceptions taken: but a general ob-

jection to the admission or rejection of evidence does not comply with the rule, and unless the ground of objection upon which the assignment is based is specifically set out, the assignment will not be considered (*Haldane* v. *U. S.,* 69 Fed., 819; *Erie Ry. Co.* v. *Schomer,* 171 Id., 798-805; *Pioneer S. S. Co.* v. *Jenkins,* 189 Id., 312). Inasmuch, therefore, as neither the bill of exceptions, nor this assignment number 1 discloses any proper or specific ground of objection to either of the questions to which we have referred, it follows, we think, that this assignment should be disregarded.

The second assignment of error is even worse than the first: it is open to the criticism which we have directed against the first: the objections claimed were never made; and no exception whatever was reserved to any ruling. An examination of the bill of exceptions at the top of page 40 of the Record, will clearly show the absence of any objection or exception: and this assignment of error itself makes no claim whatever that any exception was reserved. In other words, the indispensable foundation for the assignment of error is entirely lacking.

The third assignment is equally bad, we submit. The one ground of objection relied upon,—the only alleged error "intended to be urged,"—is that the question and answer were "immaterial" to any issue in the case; and, as we have already seen, such a ground as this is wholly unspecific, entirely too vague,

general and indefinite, and furnishes no basis for an assignment of error.

The fourth assignment of error, is, we submit, even worse. When we turn to page 40 of the Record, line 6, from the bottom, we discover that the bill of exceptions exhibits no objection whatever to this testimony, whether upon the ground of immateriality, or upon any other ground. The plain fact about the matter is that the bill of exceptions at the place cited affirmatively shows that neither objection nor exception was taken to the testimony; and consequently no foundation was laid in the bill of exceptions for this assignment of error. Besides this, the assignment itself is so vague, indefinite, unspecific and lacking in particularity, and is such an evident attempt to utilize the assignment of errors for the purpose of importing new matter into the cause, that this assignment, like the others, should, we submit, be disregarded.

The same criticism is true of the fifth assignment of error. An examination of the bill of exceptions will disclose that the defendant never did move to strike out all or any of the answers in paragraphs 1, 2, 3 and 4 of the assignment of errors, whether upon the ground set forth in said paragraphs, or on any other ground whatever; and an examination of the bill of exceptions will further disclose that no such motion ever was denied by the court, and further that the defendant never excepted to any ruling of the court below denying any such motion. In brief,

no foundation whatever for this assignment of error can be discovered in the bill of exceptions, and it is only another instance wherein an attempt is made in the assignment of errors to "supply deficiencies" (*Harding* v. *Illinois,* 196 U. S., 28) in the record of the court below, and to import into the record on error matter which is wholly unjustified by the record below.

The sixth assignment of error deals with the admission of the probate record. The bill of exceptions does show, on page 55 of the Record, that an objection was taken and an exception reserved to the admission of this probate record, the ground being that the probate proceedings were in the name of Peter Spino, whereas the name of the deceased in this case was Pietro Spina. The fact, however, is, as an examination of the Record of the court below in this cause, and of the probate record, and of the amended complaint and the answer in the present case will demonstrate, that the deceased was known by both names, not only as Pietro Spina, but also as Peter Spino. This fact is shown affirmatively by all of the documents mentioned.

The seventh assignment of error is also objectionable, and should, we submit, be disregarded. The bill of exceptions, on page 41 of the Record, shows that an objection was taken and exception reserved to the ruling of the court permitting the question quoted to be asked: but the objections made to the question

were so vague, indefinite and unspecific within the doctrine of the authorities which we have heretofore cited, that those objections, we submit, furnish no basis for the present assignment of error. We have heretofore called attention to the decisions of the courts condemning the dragnet "incompetent, irrelevant and immaterial": the objection that the question calls for the conclusion of the witness nowhere attempts to specify any particular vice in the question; and the objection that no foundation was laid for the question wholly fails to designate in what respect, or to what extent, a proper foundation was lacking. As the courts have said over and over again, if the objection had been specific in character, no doubt it would have been obviated on the spot; and a mere "rattle of words," we submit, cannot be used to confuse or obscure in the lower court the real point (if any) of the objection and to conceal it until disclosed in the Appellate Court.

The eighth assignment of error has no foundation whatever in the bill of exceptions. An examination of the bill of exceptions, near the bottom of page 41 of the Record, will not disclose any objection to any such question as that quoted in the eighth assignment of error, whether upon the grounds asserted, or upon any other ground, or any exception to any ruling of the court below upon the question quoted. Moreover, this assignment of error is open to all of the objections and subject to all of the criticism which we have urged against the seventh assignment of error.

We are unable to find in the bill of exceptions the question quoted in the ninth assignment of error. We do find on page 49 of the Record, just below the middle of the page, a question in which the words quoted as a question in the ninth assignment of error are included: but whether the question objected to according to the bill of exceptions is the same question referred to in the ninth assignment of error, we are unable to decide. If it should be taken, however, that the question referred to in the ninth assignment of error was intended as a reproduction of the question referred to on page 49 of the Record, then this ninth assignment of error is open to all of the objections and subject to all of the criticisms which we have ventured to formulate as against the seventh and eighth assignments of error.

Then come those assignments of error which deal with the charge to the jury. They include assignments numbered from ten to twenty-three, both inclusive; and in our opinion, no one of these assignments should be considered by the court in disposing of the present writ of error. It may be pointed out that assignments of error to instructions asked or refused will be disregarded where they do not "refer to the "evidence that shows the relevancy to the proposition "of law sought to be charged" (*Newman* v. *Virginia, etc. Co.* 80 Fed., 228; *Union Casualty Co.* v. *Schwerin,* Id., 638; *Chicago, etc. Co.* v. *Bennett,* 181 Id., 799, 800; *Chapman* v. *Reynolds,* 77 Id., 274; *Western M. C. L. Co.* v. *Scaife,* 80 Id., 352); but none of these

assignments of error comply with this rule, and for the most part, they content themselves with the vague statement that the instruction correctly stated the law and was not in any form given by the court to the jury. In the next place, although an assignment of error should be specific in its character, still, it will not be considered if based upon a general exception in the court below (*Vider* v. *O'Brien,* 62 Fed., 326; *Erie Ry. Co.* v. *Kennedy,* 191 Id., 332; *Baltimore* v. *Maryland,* 166 Id., 641; *Garrett* v. *Pope Motor Car Co.,* 168 Id., 905; *Pickham* v. *Wheeler Bliss Mfg. Co.,* 77 Id., 663); and, *a fortiori,* assignments of error with relation to the charge to the jury cannot be considered unless based upon objections properly made and exceptions equally properly reserved before the jury retired (*Star Co.* v. *Madden,* 188 Fed., 910; *Wabash Screen Door Co.* v. *Lewis,* 184 Id., 260; *St. Louis, etc. Ry. Co.* v. *Underwood,* 194 Id., 363). And this rule is in consonance with the rule 22 of the rules of the United States District Court for the Southern District of California, above quoted, and with the settled doctrine established by the authorities already cited, that exceptions to the charge, and to the action of the court, in giving, modifying or refusing proposed instructions, must be taken while the jury is at the bar, the latest expression of opinion upon this subject by this court being found in *Beatson Copper Co.* v. *Pedrin,* 217 Fed., 43. But it appears from the statement of the learned Judge of the court

below inserted in the bill of exceptions that not only was rule 22 not followed as it is written, but "no "exceptions were noted before the jury left the box "to consider of their verdict" (Record, p. 129). From the same page of the Record, it appears that after the Court had charged the jury, and while the jury was still in the box, the Court asked a question of counsel, as follows:

"THE COURT—The rule of court requiring ex- "ceptions to be noted at the time— It is generally "the practice to waive that and allow the exceptions "to be taken at a subsequent time. Will you stipu- "late that may be done?

"MR. DUNNE—Yes, your Honor, if it is agree- "able to counsel on the other side.

"MR. SHORT—Yes."

In other words, the same situation is presented here as was presented in *Beatson Copper Co.* v. *Pedrin,* 217 Fed., 43, where counsel stipulated in the presence of the Court and jury, before the jury retired, that the exceptions might be reserved at a later date. The learned Judge of the court below seemed to think that his question to counsel, and the replies of counsel to that question, constituted a "stipulation," and "that this stipulation was not only between the par- "ties, but that the court was a party to it": but, if it were a stipulation, it was no more a stipulation that the stipulation in the Beatson case, and the court be-

low in the present cause was no more a party to that stipulation than was the trial Judge in the Beatson case. In other words, we are unable to distinguish the present situation from that involved in the Beatson case; and upon the authority in that case we respectfully insist that settled rules of law are not to be stipulated away at the pleasure of the parties, whether in response to a question by the learned Judge of the court below, or otherwise. In *W. U. Tel. Co.* v. *Baker,* 85 Fed., 690, this court applied the rule for which we are contending even though the practice and rulings of the trial court there did not permit exceptions to be taken in the presence of the jury: in *Mountain Copper Company* v. *Van Buren,* 133 Fed., 1, this court applied the rule for which we are contending, even though the court offered to have the record show that the exceptions were reserved in the presence of the jury: in *Copper River Co.* v. *Heney,* 211 Fed., 459, this court applied the rule for which we are contending not only to exceptions to the instructions given, but also to exceptions to the refusal of requests for instructions; and in *Beatson Copper Co.* v. *Pedrin,* 217 Fed., 43, this court enforced the rule for which we are contending although counsel actually stipulated in the presence of the Court and jury, before the jury retired, that the exceptions might be reserved at a later date; and the same doctrines, as we have already seen, are enforcd in other circuits. We think, therefore, that it was not competent for the

parties to enter into any such so-called "stipulation," and that, whatever the parties may have thought at the time, the forms and modes of procedure of the Federal Courts are not to be altered or modified in accordance with so-called "stipulations" of the parties.

We submit that the twenty-fourth and twenty-fifth assignments of error should not be considered by this court. The refusal to instruct a verdict for the defendant at the close of the plaintiff's evidence is good ground for error, if the defendant rests his case on the plaintiff's evidence and introduces none in his own behalf (*Grand Trunk Ry.* v. *Cummings,* 106 U. S., 700; *Accident Ins. Co.* v. *Crandal,* 120 Id., 527); but upon the introduction of evidence by the defendant, exceptions to an order denying a motion for the nonsuit or denying a motion to instruct the jury to render a verdict in favor of the defendant and against plaintiff are waived (2 *Foster Fed. Pr.*, p. 1555-6, n. 64; *Fulkerson* v. *Improvement Co.,* 122 Fed., 982; *Coeur d' Alene Lumber Co.* v. *Goodwin,* 181 Id., 951; *Philadelphia Casualty Co.* v. *Techheiner,* 220 Id., 401, 407; *Columbia, etc. Ry.* v. *Means,* 136 Id., 83; *Cotton Mills* v. *Cotton Co.,* 156 Id., 225, 232); and consequently, an assignment that the court erred in denying the motion of the defendant for a nonsuit, or the motion of the defendant to instruct the jury to render a verdict in favor of the defendant and against the plaintiff, is bad and will not be considered, when the exception taken to the ruling neither recites nor shows that it contains all the evidence (*Chicago* v. *Troy*

Laundry Mch. Co., 162 Fed., 678). And, in common with the other assignments of error, these two assignments cannot, we submit, be considered, because entirely too vague, indefinite, unspecific and lacking in particularity.

The next assignment of error, number twenty-six, purports to deal with the insufficiency of the evidence to justify the verdict, but no attempt is made to indicate wherein or how or why any of the evidence is insufficient to justify any finding referred to. General and unspecific assignments of this character will not be considered, because they do not conform to the rule (*Chicago, etc. Ry.* v. *Anderson,* 168 Fed., 902; *Ireton* v. *Pa. Co.,* 185 Id., 84; *W. U. Tel. Co.* v. *Winland,* 182 Id., 493).

The last of these assignments of error is the twenty-seventh, and it purports to assign error upon the verdict of the jury in favor of the plaintiff and against the defendant. But an assignment of error that the court erred in overruling the defendant's motion for a new trial and entering judgment for plaintiff, is too general and indefinite to be considered (*W. U. Tel. Co.* v. *Winland,* 182 Fed., 494): an assignment that the court erred in rendering judgment against the defendant and in favor of the plaintiff, is likewise bad (*U. S.* v. *Ferguson,* 78 Fed., 103; *La. Ry.* v. *Levee Commissioners,* 87 Id., 594; *Supreme Lodge* v. *Withers,* 89 Fed., 160); and an assignment that the judgment is contrary to the law and the evidence, is likewise fatal (*Craig* v. *Dohr,* 145 Fed., 307); and in

line with the spirit of these rulings, we submit that an assignment that the jury returned a verdict in favor of the plaintiff and against the defendant, which verdict the plaintiff in error assigns as error as being against law, is likewise bad and cannot be considered. Moreover, no foundation is laid in the bill of exceptions for this assignment of error: it nowhere appears that at the time when the jury returned their verdict, the defendant either objected or excepted to that verdict. The verdict of the jury was rendered on May 18, 1915 (Record, p. 31): but the first intimation or statement anywhere contained in the record upon this writ of error that the defendant either objected or excepted to the verdict, appears in the bill of exceptions, on page 131 of the record. This bill of exceptions was not prepared or presented prior to August 6, 1915, because the time within which the defendant might prepare and present its bill of exceptions in the case was extended to and including the 6th day of August, 1915 (Record, p. 131); and the bill of exceptions was not settled or filed until October 13, 1915 (Record, p. 136). It becomes therefore important to point out the recital in the bill of exceptions, on page 131 of the Record, that the jury returned a verdict which will be found in the judgment roll herein, "and to which verdict the defendant "*NOW* duly excepts"; and to point out the further significant recital in this assignment number twenty-seven to the effect that "the jury returned a verdict

"in favor of plaintiff and against defendant to which "verdict the defendant *THEREAFTER* duly excepted" (Record, p. 156). In other words, the rule which requires the prompt taking of objections and reservation of exceptions was not complied with, no foundation exists in the bill of exceptions for the present assignment of error, and the same should be disregarded by the court. Upon the whole, then, we respectfully submit that, since there are no proper assignments of error before this court upon this writ of error, the judgment herein should be affirmed.

GENERAL PRINCIPLES OF REVIEW.

The judgment will be regarded as correct: reversible error must be made to appear affirmatively upon the record: if any evidence be disclosed which might fairly sustain the verdict, or if the verdict be reached upon conflicting evidence, the verdict will remain undisturbed: in this court, the record must be considered in that aspect most favorable to the plaintiff below; and the action of the trial court in denying a new trial, will not be overlooked here.

We have already stated our objections to the assignments of error in the present cause; and if those objections are sound, and if in consequence thereof the assignments of error are disregarded, that, we take it, would be the end of this controversy. But we have no desire to stop here; and we wish now to proceed to discuss the cause at bar upon the hypothesis that these assignments of error are sufficient and adequate within the rules of law. In other words, we wish, for argumentative purposes only, to assume the sufficiency of

these assignments of error, and, upon that assumption, to consider the case at large. We have already seen that, in an Appellate Court, every presumption will be indulged in favor of the correctness of the judgment of the lower court: but the general principles of review do not stop with that bald statement; and, on the contrary, there are certain other rules which obtain in an Appellate Court, and which operate in aid and favor of the judgment. There is no antecedent presumption which we are aware of that the verdict of a jury is wrong: while the burden is upon the plaintiff to satisfy the jury of the defendant's liability, still, after a verdict for the plaintiff, the burden is on the defendant to make it clearly appear that the verdict was wrong (See, for example, *Coombs* v. *King,* Ann. Cas. 1912-C, 1121); and after a verdict for the plaintiff, and in the Appellate Court, not only do the ordinary rules as to the inferences which may be drawn fully apply, but those other rules to which we have referred likewise obtain. In other words, all presumptions are in favor of right rather than of wrong: a verdict will be presumed to be right until, by an affirmative showing upon the record, the contrary is established: every reasonable intendment will be indulged in favor of the correctness of the proceedings; and the presumption that the verdict was right becomes conclusive upon a failure of the record to disclose such real, substantial error as must necessarily have operated to the distinct prejudice of the

complaining party. We wish, now, briefly to formulate those other rules in aid of the judgment to which we have referred.

1. If this record disclose any evidence which, when fairly considered, might sustain the verdict, that verdict will not be disturbed: "unless the testimony was such that no "recovery can be had upon the facts shown in any view "which can be properly taken of them, the verdict and "judgment of the District Court must be affirmed."

Myers v. *Pittsburg Coal Co.,* 233 U. S., 184, 193;
U. S. Express Co. v. *Ware,* 87 Id. (20 Wall), 543;
Prentice v. *Zane,* 49 Id. (8 How.), 470;
Humes v. *U. S.,* 170 Id., 210;
Lancaster v. *Collins,* 115 Id., 222;
Standard Oil Co. v. *Brown,* 218 Id., 78.

The independence of the jury is everywhere guarded with a jealousy that is conditioned only by the protection of litigants from verdicts so improper, or so unjust, that the court can see either that some very gross mistake has occurred, or that some illegitimate motive, bias or feeling has intruded itself into the jury box (*Bayliss* v. *Ins. Co.,* 113 U. S., 316; *Dunlop* v. *U. S.,* 165 Id., 486; *Myers* v. *Pitts. Coal Co.,* 233 Id., 184; *Post* v. *U. S.,* 135 Fed., 1, 11-12; *Davis* v. *Memphis City Ry.,* 22 Id., 883, 887): it was for the jury to determine whether there was any negligence of the defendant which brought about the death of the de-

ceased; no sufficient reason is perceived by us why that issue should be treated differently from any other issue which comes before a court; and in our opinion the sane view of the matter is that the law does not require demonstration (Code of Civil Procedure, sec. 1826), upon this issue any more than upon any other issue presented for adjudication. In a word, the question as to the existence of negligence was for the jury, and if this record contain any facts from which the inference of negligence might be drawn, this Court will not interfere with the verdict, no matter what its own views may or may not be. When, in *Reay* v. *Butler,* the appellant contended in substance that the Appellate Court should sit practically as a *Nisi Prius* Court, and draw its own conclusion from the evidence, regardless of the conclusions reached by the jury, the Supreme Court, replying to that contention, remarked that:

> "It has been held here in more than one hundred cases, commencing with *Payne* v. *Jacobs,* 1 Cal., 39, in the first published book of reports of this court, and ending with *Dobinson & McDonald,* 92 Cal., 43, in the last volume of such reports, that the finding of a jury or a court as to a fact decided upon the weight of evidence will not be reviewed by this court; and so, the general rule is clearly established."

Reay v. *Butler,* 95 Cal., 206, 214.

2. A verdict reached upon conflicting evidence will not be disturbed by the Appellate Court.

Alaska Packers' Ass'n. v. *Domenico,* 117 Fed., 99;
The Oscar B, 121 Id., 976;
Paauhau Plant. Co. v. *Palapala,* 127 Id., 920;
Barton Bros. v. *Texas Produce Co.,* 136 Id., 355;
Coast Wise Co. v. *Baltimore Co.,* 148 Id., 837.

There is good reason for this rule; because where a case fairly depends upon the effect or weight of the testimony, it is one for the consideration and determination of the jury (*Semet-Solway Co.* v. *Wilcox,* 143 Fed., 839); and if different minds might draw different conclusions or inferences from the facts proved, or if there be doubt as to the proper inference to be drawn, the proper inference is to be settled by the verdict of the jury (*Prentice* v. *Zane,* 49 U. S. (8 How.), 470; *Sioux City Ry.* v. *Stout,* 84 Id. (17 Wall.), 657; *Aetna L. I. Co.* v. *Ward,* 140 Id., 76, 91; *Beatty* v. *Life Ins. Ass'n.,* 75 Fed., 65, 68). So rigidly is this rule enforced, that even in cases where there is a preponderance of evidence against the verdict, still the verdict will not be disturbed (*Burch* v. *S. P. Co.,* 145 Fed., 443), nor will the verdict be disturbed because the defendant is dissatisfied with it (*Fabricant* v. *Phila. Ry.,* 138 Fed., 976); nor will it be disturbed because of the views of the Appellate Court itself as to the merits of the action (*Ill. Central Ry.* v. *Foley,* 53

Fed., 459; *Wertheim Coal Co.* v. *Harding,* 145 Id., 660; *Aetna Life Ins. Co.* v. *Ward,* 140 U. S., 76, 91). There are numerous other cases to the same effect which might be cited: but no rule is better settled than this, or has a surer foundation; and its roots are to be found in the constitutional provision conserving the right of trial by jury, and in the fitness of twelve men, selected from the average of the community, for the purpose of passing upon questions of negligence (*Herbert* v. *S. P. Co.,* 121 Cal., 227, 229; *Wahlgren* v. *Market St. Ry.,* 132 Id., 656, 663-4). Thus, the general attitude of the federal courts upon this matter may be well illustrated by the following brief excerpt from *Illinois Ry.* v. *Foley, supra*:

> "That the evidence tended to establish negligence was enough to make it the duty of the court to submit that issue to the jury. Where negligence may be fairly deduced or inferred from proved or conceded facts, the case must be left to the jury. Neither this, nor any other court can set aside the verdict of a jury simply because the court would have reached a conclusion different from that of the jury upon the facts. To do so would be to usurp the functions of the jury."

3. **In determining in an Appellate Court questions of the character of those involved in the cause at bar, the testimony must be considered in its most favorable aspect to the plaintiff below.**

Myers v. *Pittsburg Coal Co.,* 233 U. S., 184, 193;
Hepburn v. *Dubois,* 37 U. S. (12 Pet.), 345.

In other words, the plaintiff below, defendant in

error here, is entitled to the benefit, not only of all the facts which the evidence tended to establish, but also of every conclusion and inference which might fairly be drawn from the evidence produced; and unless as matter of law no recovery could be had upon any view which could properly be taken of the facts which the evidence tended to establish, and of the inferences from those facts, the verdict will not be disturbed.

Myers v. *Pgh. Coal Co.,* 233 U. S., 184, 193;
Davidson S. S. Co. v. *U. S.,* 205 U. S., 187, 190-1;
Hackfield & Co. v. *U. S.,* 197 Id., 442, 446-7;
James v. *Appell,* 192 U. S., 129, 136-7.

From these authorities it will be quite clear that it is not the object of the law lightly to subvert the findings of a jury in a negligence case; and while the court will protect parties against improper verdicts, still, it will not impair the right of trial by jury under the disguise of determining whether the verdict is against the weight of the evidence (*Phoenix M. L. I. Co.* v. *Doster,* 106 U. S., 30; *Klutt* v. *Philadelphia Ry.,* 145 Fed., 965, 148 Id., 818; *Davis* v. *Memphis City Ry.,* 22 Id., 883, 887; *Cascade Foundry Co.* v. *Muller Furnace,* 140 Id., 491). And so, likewise, in determining whether the plaintiff in a suit for damages for negligence was so clearly guilty of contributory negligence as to entitle the defendant to a verdict,

the court of review is bound to put upon the testimony the construction most favorable to the plaintiff, where the verdict was for him (*Chicago, etc. Ry.* v. *Lowell,* 151 U. S., 209).

4. **Where the trial court by refusing a motion for a new trial evidences its satisfaction with the verdict, an Appellate Court will be extremely loath to interfere with such verdict.**

It is, of course, the province of the trial judge in the federal courts, either before submitting a case to a jury, or after verdict upon motion for a new trial, to determine for himself whether the evidence produced by the plaintiff is sufficient to authorize a jury to draw the inference of negligence (*Myers* v. *Pittsburg Coal Co.,* 233 U. S., 184; *Commissioners* v. *Clark,* 94 Id., 278; *N. Y., etc. Ry* v. *Diffendaffer,* 125 Fed., 893): but in the cause at bar, that question was resolved in favor of the plaintiff below, as the presence of this cause in this Appellate Court clearly demonstrates. The state cases supporting the rule against interference with the verdict by the Appellate Court, when such verdict is based upon some evidence at least, and has been approved by the trial court, are innumerable; but we shall content ourselves with referring to the following as sufficient to indicate recognition of the rule by the Federal Courts also: *Atlantic Coast Line Ry.* v. *Linstedt,* 184 Fed., 36, 43. And that the rule just invoked is recognized in the State of California, may

be evidenced by the following brief quotation out of many that might readily be made:

> "The evidence was such as to legally support a conclusion that all these circumstances existed. Assuming the situation to have been as described, as we must do, in view of the verdict, we are clearly of the opinion that it may not be held, as matter of law, that the defendant was not guilty of negligence. And if this be so, the findings of the Jury, *and the conclusion of the learned trial Judge on motion for new trial,* so far as this question is concerned, are conclusive upon us."

Tousley v. *Pac. Elec. Ry.,* 166 Cal., 457, 461.

5. Summary on these points.

From an examination of the foregoing authorities, we submit it to be reasonably clear that a verdict of a jury in a negligence case, should be vacated only in the very clearest sort of a case. The independence of the jury in matters of fact has always been recognized by the courts: they are the constitutional triers of the facts; and their findings, especially in cases depending upon the inferences to be drawn by practical judgment, are not to be lightly set aside. It is, indeed, the highest effort of the law to obtain the judgment of twelve men of the average of the community as to whether negligence does or does not exist in a given case. Upon this writ of error, we submit that the defendant in error is entitled to the benefit, not only of all the facts which the evidence tended to establish, but also of every inference and conclusion which

may fairly be drawn from the evidence produced; and unless, as matter of law, no recovery could be had upon any view which could be properly taken of the facts which the evidence tended to establish, and of the fair inferences from those facts, this verdict should not be disturbed. In cases of doubt as to the proper inferences to be drawn, or where the facts are such that different minds might draw different inferences or conclusions from them, the jury are the supreme judges of the facts and of the inferences to be drawn therefrom; and in such cases, to set aside their verdict would be to usurp their proper province and to substitute the opinion of the court for that of those who are the constitutional triers of questions of fact. And that the inferences from the facts are to be drawn by the jury, and are not for the court, and that the ultimate fact of negligence is determinable by inference are settled propositions in the law. The general and unquestioned rule undoubtedly is that where a decision of fact was reached upon conflicting evidence, the courts will not interfere, and wherever there is any evidence from which an existence of facts sufficient to support the verdict might have been inferred, the verdict will not be disturbed. Nor is there anything in the recorded views of the federal courts antagonistic to this suggestion. On the contrary, as federal judicial history will attest, the federal courts have always stood firm for the proposition that a verdict reached upon conflicting evidence, or upon conflicting infer-

ences from the evidence, will not be disturbed; and so solidly has this principle become grounded in federal jurisprudence that the case must be an extremely rare, unusual and extraordinary one where it will be departed from (*Myers* v. *Pittsburg Coal Co.*, 233 U. S., 184). The present, we submit, is not such a case; and we respectfully contend that any person reading with an open mind the evidence introduced upon the second trial of this present action, will find the conclusion to be irresistible that the verdict of the jury was and is supported by the evidence both ample and convincing; and it is submitted that a careful examination, comparison and contrast of the authorities heretofore cited will justify the statements of the law which have just been made.

THE NATURE AND PROOF OF NEGLIGENCE.

There is nothing occult about the nature or proof of negligence: the issue of negligence is not to be treated otherwise than, or differently from, any other issue presented for determination: negligence is a conclusion drawn by practical judgment from the facts proved; and no mysterious restrictions surround or insulate the mode of its proof.

(a) The nature of negligence:

It may not be amiss to point out "negligence is the "failure to do what a reasonable and prudent person "would ordinarily have done under the circumstances "of the situation, or doing what such a person under "the existing circumstances would not have done. "The essence of the fault may lie in omission or com-

"mission. 'The duty is dictated and measured by the "exigencies of the situation'" (*B. & P. Ry.* v. *Jones,* 95 U. S., 439). Negligence, then, is the failure to exercise due care (*Kelly* v. *Malott,* 135 Fed., 74, 76; *Beyer* v. *Hamburg-American S. S. Co.,* 171 Id., 582, 583): it includes all those shades of inadvertence which range between deliberate intention, on the one hand, and total absence of responsible consciousness, on the other; and it may consist in pure passivity (*Basler* v. *Sacramento Gas Co.,* 158 Cal., 514, 519). But negligence is not absolute, it is wholly concrete; and it is always relative to the special facts and circumstances of the particular case (*Charnock* v. *T. & P. Ry.,* 194 U. S., 432, 437; *Sandy* v. *Swift & Co.,* 159 Fed., 271, 165 Id., 622; *Fox* v. *Oakland Ry.,* 118 Cal., 55, 61-2). Negligence need not be wilful (*Bayne* v. *Irwin,* 72 S. W. (Mo.), 522); and to allow one's attention to become distracted, is to be negligent (*Gaudet* v. *Stansfield,* 65 N. E. (Mass.), 850); and it may be added that although several acts of negligence may be alleged in a complaint, still, the plaintiff does not have to establish them all, and one only need be proved.

Smith v. *M. P. Ry.,* 56 Fed., 458, 460;
Cross v. *Evans,* 86 Fed., 1, 6;
Balakala Cons. Copper Co. v. *Whitsett,* 221 Fed., 421;
The Sargent Co. v. *Shukair,* 138 Ill. App., 380; 85 N. E., 621;

Dutro v. *Metr. St. Ry.*, 86 S. W. (Mo.), 915;
L. & M. Ry. v. *Mothershed*, 97 Ala., 261;
Columbus v. *Anglin*, 120 Geo., 785;
Greer v. *Ry.*, 21 S. W. (Ky.), 649;
Hagerman v. *Chapman Timber Co.*, 133 Pac. (Ore.), 342.

And the rules defining the nature and extent of the employer's duty to provide for the safety of his employees, are thus summarized by Circuit Judge Morrow, speaking for the Circuit Court of Appeals for this circuit:

"In general terms, the degree of care required "of an employer in protecting his employes from "injury is the adoption of all reasonable means "and precautions to provide for the safety of his "employes while they are engaged in his employ- "ment, and this degree of care is to be measured "by the dangers to be apprehended or avoided.

"The employer, whether a natural person or a "corporate body, is under obligation not to expose "the employe in conducting the employer's busi- "ness to perils or hazards against which he may "be guarded by proper diligence on the part of "the employer.

"The care required of the employer is that of "reasonable diligence; 'and reasonable diligence "implies, as between the employer and the em- "ployé, such watchfulness, caution and foresight "as, under all the circumstances of the particular "service, a corporation controlled by careful and "prudent officers ought to exercise.'

"The failure of the employer to exercise such "reasonable diligence, caution, and foresight as a

"prudent man would exercise under the circum-
"stances is negligence. . . .

"It was the duty of the defendant to use reason-
"able diligence in furnishing a safe place for its
"employe to work in, and whatever risk the em-
"ploye assumed in carrying on the defendant's
"business did not exempt the defendant from that
"duty."

Sandidge v. *Atchison etc. Ry.,* 193 Fed., 867, 872.

And so, likewise, the same court, speaking through Circuit Judge Gilbert, observes:

"It was the duty of the plaintiff in error to fur-
"nish the defendant in error a safe place in which
"to work, and to keep it reasonably safe during the
"progress of the work. That duty was not con-
"fined to the spot in which the defendant in error
"regularly or principally worked. It extended to
"places where he had to go in the course of his
"work, and that duty could not be delegated to
"another so as to relieve the plaintiff in error of
"liability for failure to perform it. The defend-
"ant in error had the right to look to his employer
"for the discharge of that duty, and if the latter,
"instead of discharging it himself, saw fit to dele-
"gate it to another servant, he did not thereby
"alter the measure of his own obligation. . . .

"Nor did the defendant in error assume the
"risks resulting from a breach of duty of the
"plaintiff in error to furnish him a safe place in
"which to work, whether that duty was assumed
"by the master, or was by him delegated to an-
"other."

N. P. Ry. Co. v. *Schoeffler,* 193 Fed., 627, 629-630.

No master or employer has any right to speculate either with his appliances or with the lives of those who use his appliances: "the law does not permit an "employer to take any chances as to the safety of his "employees" (*Broomi* v. *Construction Co.,* 159 Cal., 89, 94): and "if such speculation were as matter of law sufficient to repel the affirmable inference of negligence, responsibility might be quite easily avoided."

(*Miller* v. *O. S. S. Co.,* 118 N. Y., 199, 209.)

And see further upon this topic:

Hough v. *T. & P. Ry.,* 100 U. S., 213;
U. P. Ry. v. *Forb,* 84 Id. (17 Wall), 553;
Wabash Ry. v. *McDaniels,* 107 Id., 454;
N. P. Ry. v. *Herbert,* 116 Id., 642;
Washington etc. Ry. v. *McDade,* 135 Id., 554;
Mather v. *Rillston,* 156 Id., 391;
S. P. Co. v. *Lafferty,* 57 Fed., 540;
N. W. Fuel Co. v. *Danielson,* Id., 915;
Rocky Mt. Co. v. *Bassett,* 178 Id., 768.

(b) **The Proof of Negligence.**

The proof may be either direct or inferential: the ultimate fact of negligence may be inferred by the jury from all the facts and circumstances exhibited by the testimony before them; and not only is circumstantial evidence of negligence enough to sustain a verdict, but it need not exclude all other possible

hypotheses: indeed, in drawing its inference of negligence, the jury may consider the general conditions and surroundings, particularly where there is an absence of evidence of fault on the part of the person killed, and where the conditions and surroundings are such as reasonably to admit of the inference of lack of due care.

Waters-Pierce Oil Co. v. *Deselms,* 89 Pac. (Oklahoma), 212, 216-17: Affirmed, 212 U. S., 159, 176-7;
Choctaw etc. Ry. v. *McDade,* 191 U. S., 64;
Massner v. *Atchison Ry.,* 177 Fed., 618;
W. U. Tel. Co. v. *Catlett,* Id., 71;
T. & P. Ry. v. *Coutourie,* 135 Id., 465;
Wabash Screen Door Co. v. *Black,* 126 Id., 721;
Jones v. *Penn. Ry.,* 114 Id., 984;
Portland Mining Co. v. *Flaherty,* 111 Id., 312, 314;
Boucher v. *Larochelle,* 15 L. R. A., N. S., 416;
Jones v. *Leonardt,* 10 Cal. App., 284.

Neither direct evidence, nor a demonstration, of negligence is necessary: if the probable cause of the injury be the negligence of the defendant, the verdict should be sustained; and if no other cause than the defendant's negligence is fairly adequate to explain the occurrence, the jury may so infer.

Waters-Pierce Oil Co. v. *Deselms, supra;*
T. & P. Ry. v. *Carlin,* 189 U. S., 354;

Home Insurance Co. v. *Weide,* 78 Id. (11 Wall), 438;
V. & S. W. Ry. v. *Hawk,* 160 Fed., 352;
Cecil v. *American S. S. Co.,* 129 Id., 542;
Toledo Brewing Co. v. *Bosch,* 101 Id., 530;
Western, etc. Ry. v. *Shivers,* 61 Atl. (Md.), 618;
Moody v. *Peirano,* 4 Cal. Appeals, 411, 420.

The precise defect by which, or the exact way in which, the injury or death occurred, need not be proved:

Champagne v. *A. Hamburger & Sons,* 169 Cal., 683, 689.

The suggestion of possible theories by the defendant intended to be exculpatory of the charge of negligence, does not turn the case into one of guess or speculation: a theoretical possibility, unsupported by any reasonable probability based upon the evidence in the cause, that the injury was caused by some means other than the negligence of the master, will not outweigh proof which carries conviction to the ordinary mind that the negligence of the master caused the injury:

Choctaw etc. Ry. v. *McDade,* 191 U. S., 64;
Wabash Screen Door Co. v. *Black,* 126 Fed., 721;
Boucher v. *Larochelle,* 15 L. R. A., N. S., 416;

Burns v. *Ruddock etc. Co.*, 38 Sou. (La.), 157;
Wolfarth v. *Sternberg*, 56 Atl. (N. J.), 173;
Angel v. *Jelly Coal Co.*, 74 S. W. (Ky.), 714.

The language of the New Hampshire court in *Boucher* v. *Larochelle, supra,* is so pertinent, that we cannot refrain from quoting the following brief passage therefrom:

"The claim is that the death of the child may "have been due to its condition, or may have been "the direct result of the fracture, and that there- "fore the plaintiff failed to prove that the defend- "ant's negligence was the cause of death. Using "the word 'proof' in the sense of demonstration "to an absolute certainty, the defendant's conten- "tion could probably be sustained. Questions "capable of exact demonstration are rarely the "subject of litigation. No such burden rested on "the plaintiff. *He was not bound to exclude all "possible causes of death.* He was required only "to make it more probable than otherwise that the "fact was as he claimed it. The rule of *Deschenes* "v. *Concord & M. R. Co.*, 69 N. H., 285, 46 Atl., "467, that the jury cannot be permitted to deter- "mine by guess or conjecture between two equally "probable causes of the injury, for one only of "which the defendant is responsible, *has no appli- "cation unless the existence of a sufficient cause or "causes for the injury, aside from the negligence "charged, is conceded or conclusively proved.*"

REVIEW OF FACTS.

There was evidence before the jury from which they could properly have drawn the inference and have reached the conclusion that the death of the deceased was due to the negligence of the defendant.

We believe that a general review of the facts established in this cause will be of assistance to the court, for more than one reason. We venture to believe such a review to be proper in order to explain and illustrate the theory of the plaintiff in the action, and, again, to assist the Court in appreciating the rulings of the Court below made during the progress of the trial, and, moreover, to point the sufficiency and correctness of the charge of the Court to the jury. And we think that a case of this kind should be considered as a connected and consecutive history; that no scattered or broken view should be taken of that history; and that all of the circumstances should be considered together, one fact explaining or illuminating another. We venture to believe that this suggestion is particularly true in negligence cases: because negligence is something concrete, and purely relative to the facts and circumstances of the particular case; and it is an inference which the good judgment of the jury draws from all those facts and circumstances. And in presenting this review of the facts, we shall confine our attention principally to the showing made on behalf of the plaintiff below, defendant in error here, adverting to the testimony from the defendant below,

plaintiff in error here, only whenever illustrative of that presented by the plaintiff below. We do this the more readily because, as we have already pointed out, to repeat the language of Mr. Justice Day, the testimony "must be considered in determining questions of "this character in Appellate Courts in its most fa- "vorable aspect to the plaintiff below" (*Myers* v. *Pittsburg Coal Co.,* 233 U. S., 184, 193). In other words, after a favorable verdict in the Court below, after the denial by the trial judge of a motion for a new trial, and in this Appellate Court, the defendant in error is, so to speak, much in the position of a plaintiff upon a motion for a nonsuit: that is to say, the court will assume as true every fact which the evidence, and which the inferences fairly deducible therefrom, tend to prove, and which are essential to entitle the plaintiff to recover: evidence must be taken most strongly against the defendant: contradictory evidence must be disregarded; and such a motion will be denied if there is any evidence tending to prove the plaintiff's case, without passing on the sufficiency of such evidence.

It will be observed from the Record that the complaint in this action charges more than one act of negligence: but, as we have already pointed out, it is not the law that there can be no recovery by the plaintiff unless each and every act charged is independently and specifically proved. It frequently happens that a given situation, in which an injury or death occurred,

presents several different aspects or acts of negligence, and in such cases it is a part of a prudent counsel's plain duty to charge all such acts of negligence. It often happens, also, in such cases, that, sometimes for one reason, sometimes for another, all of the acts of negligence charged are not proved, but only some one or more of them; and the law takes notice of this familiar situation, and, as the authorities already cited will demonstrate, makes it clear that where several acts of negligence are pleaded, it is not necessary that the plaintiff should prove them all, and that it is enough if the injury or death resulted from some one of them.

The case made for the plaintiff below exhibited certain undisputed facts: thus, there was no doubt that the deceased was killed: there was no doubt that he was killed on July 1st, 1912: there was no doubt that he was killed on the defendant's premises; nor was there any doubt that he was killed from the defendant's runaway harvester. Nor was any contest made in the court below as to the marriage of the deceased, or as to the existence of his child, or as to the age or expectancy of life of the deceased, and of his widow, nor as to the earning capacity of the deceased, nor as to the dependence of the widow and her child upon the earnings of the deceased for the support and maintenance of herself and her child.

As to the actual tragedy itself, the plaintiff below presented the testimony of three witnesses, Albano,

Knight, and Salapi. Albano "was on the harvester "on July 1, 1912, when Peter Spino was killed" (35): Albano "was sack tender and was on the left side" (36) of the harvester. It appears from his testimony that a man named Trainor was working with Albano, and so likewise were Salapi and Knight: "Mr. Knight "was the boss of the machine" (35). Albano tells us that "Pietro Spina was driving the mule team at- "tached to the harvester, consisting of 32 mules" (35). It appears from Albano's testimony that both during the months of June and July, 1912, "I was employed "at Midway Camp by Miller & Lux" (35), still "I do not know Twining" (35-6); and no sufficient reason appears why, if Twining were a frequent visitor to that harvester, Albano should not know him. It will appear from other portions of the testimony that Twining was a stranger to the harvester, and to the mule team attached to it, which the deceased was driving, and it will appear that Twining never made more than two visits to this harvester, one on an occasion prior to the tragedy, and the other at the time of the tragedy; and in view of this unfamiliarity of Twining with the harvester and its mule team, Albano's statement that although he had been employed during the month of June, 1912, at Midway Camp, still, he did not know Twining, is significant as a circumstance in support of the combined testimony of Knight and Salapi, as to the rarity of Twining's visits to the harvester. Albano tells us that "just before

" Peter Spino was killed I see a boy with a horse and " cart" (36). When Albano first saw this boy with the horse and cart, the boy was pretty close to the machine, was on the left side of the harvester, was going in the same direction as the harvester, was runing pretty fast, and the boy was holding the horse pretty strong (36). Albano then tells us that the next thing happened, this man died: "He fell down on the " ground and he died" (36). Albano states that " when the little cart was passing by the mules, it " scared them and they turned around and the man " fell down on the ground from the seat. He was " on the driving seat of the harvester. When the " mules got scared in that way they started to run " away" (36). He then describes the flight and ultimate stoppage of the frightened mule team and then states that "When they stopped I went back to the " dead body of Pietro Spina" (36). It appeared from the direct examination of Albano, that the business of the boy in the cart was to count the sacks; and he repeats this on cross-examination, and adds that "Mr. "Trainor got off the harvester and went out to the cart " to give him the number of sacks. Mr. Trainor was " not at the cart when the horse that was on the cart " began to run away. He was on the ground quite " a ways off from the cart" (37); but "The boy was " in the cart all the time" (Id.). Albano then adds the following statement on cross-examination: "I did " not notice when the horse and cart first began to run,

" —not when they started. After the horse started to " run, the mule team started to run away also" (37). On cross-examination, he repeats that "Spino fell down" and a sentence or two later states that "Spino went off." And he concludes his testimony with some remarks about the entanglement of one of the driving lines on Spino's foot.

It is thus plain from Albano's testimony that "when " the little cart was passing by the mules it scared " them" (36); and "when the mules got scared in " that way, they started to run away" (Id.); and on cross-examination he emphasizes this thought by stating, "I did not notice when the horse and cart first " began to run,—not when they started. After the " horse started to run the mule team started to run " away also" (37). In other words, this boy who " was in the cart all the time" (37), "came up to get " the number of sacks" (37): Trainor got off the harvester and went out to the cart to give the boy the number of sacks, but was not at the cart when the horse began to run away—"He was on the ground " quite a ways off from the cart" (37). It was evidently at this time that the horse started to run, and the horse was running pretty fast (36), and the boy was holding the horse pretty strong (36). The horse and cart was "on the left side of the harvester, going " the same direction as the harvester," and "pretty " close to the machine" (36). In other words, when the horse started to run, it was pretty close to the machine and was "going the same direction as the

"harvester": that is to say, was approaching the mule team from behind; and "when the little cart was pass-
" ing by the mules, it scared them," and "when the "mules got scared in that way they started to run
" away" (36). It was during this flight of this frightened mule team of 32 mules that the deceased "fell down"—"went off," and was killed. To sum up, then, this testimony of Albano, it is perfectly clear that the running of the horse preceded the running of the mule team, and that the running of the horse frightened the mule team, and caused it to run away also, thus precipitating the death of the deceased. It is, therefore, a very pertinent inquiry, as to how it came about that the horse ran at all and thus originated the series of events which terminated in the death of the deceased? Why should the horse have run? Assuming the horse to have been of a quiet and gentle disposition, and assuming this boy to have been a proper and experienced person to place in charge of the animal, assuming a reasonable degree of familiarity on the part of the boy with the horse and with the dangers incident to an easily frightened mule team, how did it come about that this horse ran at all? If the boy were competent, if the horse were gentle, if the boy were alive to the dangers associated with an easily frightened mule team, and if the boy took proper precautions to control and restrain the horse which had been committed to his use by the defendant, it is extremely difficult to understand how or why that horse should have run at all. Plainly,

there was some inattention, some inadvertence, some lack of care, some negligent management, on the part of this boy in the management, control and restraint of his horse, which gave that horse the opportunity to get his head and run.

The thoughts just suggested are reinforced by the testimony of Mr. Knight. Like Albano, Knight was also an employee of the defendant: but unlike Albano, "Mr. Knight was the boss of the machine" (35); he was "running the harvester" (38); "I was "foreman" (39). And he was an experienced person in his line of activity: "I have been engaged in farm- "ing operations for about 20 years or more. During "that time have been employed principally by Miller "& Lux, and am in the employ of Miller & Lux "now, and was in June and July, 1912, at Los Banos, "in Merced County, running the harvester" (37-8). In other words, Knight was a practical farmer who had been for many years in the employ of the defendant; and his long employment in the service of the defendant amounts to a certificate by the defendant to his competency and good character,—otherwise, the defendant never would have retained him in its employ. Moreover, he was the foreman of the harvester; and the appointment of Knight by the defendant to this position of authority exhibits the defendant's increased confidence in him. Albano and Salapi may be criticised here because they are Italians, and possibly disposed in favor of the plaintiff: but that sort of criticism has no place here, where the

testimony "must be considered in determining ques-
" tions of this character in Appellate Courts in its
" most favorable aspect to the plaintiff below" (*Myers* v. *Pittsburg Coal Co.,* 233 U. S., 184, 193). And apart from that, not only would these two witnesses have a strong motive to favor their employer, but " any attempt to attribute a rooted lack of veracity to " any one branch of the human family is based on a " self-conceited assumption or a narrow experience" (2 *Wigmore Evid.,* Sec. 936, citing *U. S.* v. *Lee Huen,* 118 Fed., 442, 463; where the learned Judge pointed out that "no discredit can legally attach to " the testimony of a person because he gives his evi-
" dence in favor of a party belonging to his own na-
" tionality"). And aside from this, not a syllable appears in this record in the way of impeachment of either of these two witnesses. Neither of them is shown to be in any way interested in the outcome of this case: there is not a single fact to justify the inference that either of them has anything to gain by distorting the facts of this case in favor of the plaintiff: the record shows them to have been decent, hard-working, orderly men, honestly earning their living and telling what they saw in a simple and direct way; and as we shall see hereafter, the stories which they tell are fully corroborated in many material matters by the very witnesses produced by the defendant below. But no criticism of any such character can attach to Knight: for he was not only a responsible em-

ployee of the defendant, retained for many years in its service, but he is not open to any charge of race bias,—he was not an Italian. In addition to all this, it will appear that Mr. Knight was familiar with all of the facts of this unfortunate history from its commencement to its close. This experienced employee of the defendant commences his testimony by explaining that in the course of his experience in farming, he had experience with horses and mules for thirty or thirty-five years, driving them, breaking them, and all kinds of experience, and was acquainted with the habits and manners of such animals. He tells us that a mule team is easily frightened and frequently runs away, and that the general characteristics of mule teams are known to persons engaged in farming operations. He says that the regular, usual noise made by a harvester when in operation will not frighten the mule team, but that any sudden noise to which they are not accustomed will frighten them. He tells us that "if " a mule team is approached from behind by another " animal, that will have a tendency to frighten the " mule team. If the animal that approaches the mule " team from behind is going at a high rate of speed, " going rapidly, that will frighten the mule team. " A mule team will be frightened by one who drives " up to it in a heedless way" (38). And Mr. Knight explains that his experience covers not only mules, but also horses, which animals he has driven, and broken, and used in various ways.

Mr. Knight recollects the boy named Twining, met him two or three times, but was not well acquainted with him: "I have seen this boy out in the field, "where this harvester was working at Midway Camp, "a couple of times. I think he was about eighteen "or twenty years of age" (38, 39). He then adds that, including himself, five men were employed on the harvester: "I was foreman, Peter Spina was "driver, Albano was sack tender, and Trainor was "sack sewer" (39). The position of the sack sewer was on the left hand side of the harvester, about two feet from the ground (39). Mr. Knight tells us that Salapi had been working about a month prior to the time when Spina was killed. He then explains Spina's situation on the harvester, telling us that he was the driver and faced the mules with his back towards the machine; and he adds that Spino had worked on that harvester about a month before the day of his death, and earned in that capacity $3.00 a day and his board, working 26 days a month (39).

Mr. Knight then goes on to describe facts which establish, not only Knight's knowledge of the liability of the mules to run away, but also the knowledge of the same fact by Twining. Knight tells us that on June 27, 1912, three days before Spina died, Twining came out to the machine driving a brown horse. Twining got out of the cart and got in where the sack sewer was: Knight was on top of the machine and looked up and saw Twining's horse going

around the team, and the "mules started to run and "I grabbed the brake and stopped them" (40). He tells us that when Twining left his cart on that occasion, he let his cart go, that the horse went up alongside the mules, and that they started to run, when Knight got to the brake and stopped them. When Knight stopped the team, he got up on the machine where Twining could see him and said to Twining, "You take care of that horse or stay out of the field; "that he might cause a runaway, and kill some- "body, or some of the mules tear up the machine" (40); and when Knight said that to Twining, he did not hear Twining make any reply, but Twining got into his cart and drove off. It is, we respectfully suggest, to be borne in mind that the parties to this occurrence were Knight, who "was in charge of the "harvester as Foreman," and Twining, who in the undenied language of paragraph IV of the Amended Complaint, was then "actually engaged in his said "employment," viz., "to follow and attend said har- "vester and count and record the sacks as they came "from said harvester" (21). In other words, this incident discloses and brings home to the defendant, through its representatives, Knight and Twining, knowledge of the dangers associated with this easily frightened mule team; and exhibits that knowledge as possessed by the defendant, through its representatives, prior to the date when the unfortunate death of Spina took place.

Three days later, Spina was killed, about half past nine o'clock in the morning. On that occasion, Knight saw the boy Twining approach the harvester. When Knight first saw him he was probably a quarter of a mile away, coming from the south, while the harvester was going west. Instead of the boy approaching in a careful manner the harvester and its team of 32 easily frightened mules, we find that he did so in a manner inconsistent with the exercise of care and caution: for Knight tells us: "The boy "Twining was approaching the harvester from the "south on that occasion, between a gallop and a run. "As he came up from the south and came on toward "the harvester, he was twisting around some, and "when he got up closer to the harvester, he whirled "around a couple of times and then drove up in front "of the machine where the sack sewer was" (41). And in further description of the extraordinary manner in which this boy approached this harvester on this occasion, Knight further tells us that "He was "running through the field, and I seen him running "over the checks, and I could tell he was coming "pretty fast. He did not pursue a straight line. He "was turning coming around, kind of twisting zig-"zag" (41). And on cross-examination, in further description of this same approach of this boy to the harvester, Knight said: "He came in on a sort of "angle, made a couple of circles, close to the back of "the machine and went in alongside" (45-6). And

on page 47, still while under cross-examination, Knight makes the significant statement, "I saw Twin-" ing after he *quieted his horse down.*"

Knight then describes the horse which Twining was driving on July 1, and states that it was a different horse from the one he was driving on June 27th. Being asked for his opinion as to this horse which Twining was using on the morning of the death of Spina, Knight stated that "It was a high-lifed, small " horse, one that needs attention. In my opinion, it " was a spirited animal" (41). In describing the cart, he tells us that it was a medium cart without any brakes, that it had two wheels but no dashboard, and that there was no one else in the cart except Twining. When Knight saw Twining approach in the way that he has described, Knight went to the brake on the harvester. The mule team was all right and was going at a slow walk; and when Twining's horse and cart got alongside of the harvester, the harvester was going west, Twining's horse was walking, the mule team was walking, and the distance between the harvester and the cart was probably 20 feet (42). Under these circumstances, Knight thought that everything was all right, and, seeing a check ahead, went down to the brake: but when he went to the brake at that time, he could not see either Twining or Trainor, because his view was obstructed by the cleaner (42).

Knight then states some further interesting facts

bearing upon the existing situation. It appears that the harvester got in motion about seven o'clock in the morning, and Spina's death happened about half past nine: but between seven and nine o'clock, the harvester crossed several checks, and on those occasions there was no runaway. It appears that a check is a slight elevation in the ground to hold the water: it is probably two feet high, or a foot and a half, some being higher and some lower, depending on the formation of the ground; and they slope up and down, a gentle slope. When the harvester was nearing the check that Knight had seen, and while Knight was at the brake, the mules started to run; and at that time, Knight saw Twining, who was running right alongside of the mules with his horse going pretty fast (42-3). Knight then excludes certain causes, to which the running of these mules might argumentatively be attributed; that is to say, he tells us, that "so far as my observation of the facts occur-
" ring there on that occasion permits, the harvester
" did not start Twining's horse to run, nor did the
" mules themselves, so far as my observation went,
" start Twining's horse to run. I did not see any
" member of the harvester do any act to start Twin-
" ing's horse or the mules" (43). After Knight lost sight of Twining and had gone behind the cleaner, the next time he saw him the horse was alongside the mules, going pretty fast, fourteen or sixteen feet away from the mule team, and running west. The mules

were running west also, and ran probably one hundred yards, when they turned sharp to the right, ran down through the grain field, probably a couple of hundred yards, to a ditch of water, and turned to the left, where Knight stopped them (43). Just before this sharp turn to the right, Knight saw Spina on the seat, but did not see him after the sharp turn to the right; and after that he next saw Spina lying on the ground dead. Twining got his horse turned about the time the mules turned: he turned to the left, about the same time that the mule team turned to the right; and after turning to the left he went about a quarter of a mile back the same way he came,—south—where he stopped, looking back,—which was the last Knight saw of him, except that Knight saw him going through the field: Twining did not return to the scene (43-4).

On cross-examination, Mr. Knight stated that it was part of his duty as foreman of the crew to take charge all over the machine and watch everything, among other things one of the brakes. He describes Twining's business there and tells us that before the day of Spina's death, he can remember of Twining having been out there only twice: "I remember his "being there once before the runaway" (44). He then goes on to describe the occurrences of June 27th, when Twining first came up, and adds that " He was " not taking care of his horse at that time" (45). He states that it is not unusual for a buggy or cart to

drive up along the harvester while it is in operation, from behind; but adds the significant statement that "They keep out of sight of the mules" (45). Mr. Knight then goes over the occurrences of the second occasion when he saw Twining at the harvester, describes Spina's earnings, describes the checks, and describes the cart. He tells us that there was a part of the time on this second occasion when he could not see Mr. Twining on the cart, "In fact, that was "the condition of things when his horse started to "run" (47). He says that Twining's horse had run about midway of the team when he, Knight, first saw it, when the team was running, and that "his horse "ran about 200 yards before he got control of it" (47). He states, "I don't know whether he (Spina) "fell or jumped off, or how he got off" (48). He also adds, "I did not see Mr. Twining or his horse "at the time that it started to run, and I don't know "what it was started Mr. Twining's horse to run. "His horse started the team to run" (48). And in re-direct examination he tells us that "The header-"tender can see all around the field" (48).

Then came the testimony of Salapi, the header-tender, whose position was on the high part of the harvester, from which, if he chose to look around, he could see in the neighborhood (48). Like Knight, this witness also has had experience in handling mules and horses, having handled them in Italy for about five years, in Brazil about fourteen years, and in Cali-

fornia for five years. He tells us that although, during that morning the harvester passed over these checks, yet there was no runaway by the mule team (49). Shortly before Spina was killed Salapi saw a boy come near the harvester in a small cart, which had no brakes and which had two wheels; and when he first saw the boy on that occasion in that cart, he was about a quarter of a mile away back of the harvester: "He was running, zig-zagging before he gets "there. When he got fairly close up to the harvester "he turned his cart about twice around. He then "got near the harvester" (49). He says that when the boy got near the harvester he was about five or six steps away from it, and his horse was then going slowly, walking. Salapi was then asked concerning the sort of animal in his opinion that this horse was, and he stated that "The horse in my opinion was full "of life" (50). He then proceeds to describe the occurrence in question in the following language:

"The mules were walking also; both the mules "and the horse and cart were walking straight in "the same direction. At that time while those "things were so, I saw Mr. Trainor; he jumps off "the harvester. He moves about two steps near "the cart. I see the boy in the cart at that time. "He was looking to Billy Trainor. I saw that he "was talking. I could not hear the words that "they said, because the harvester was making a "noise. The lines from the boy's horse were lying "on top, loose, on top of the single-trees. He had "the ends of the lines, the extreme ends, the tips, "in his left hand. He was making motions to

" Billy Trainor with his right hand. His left hand
" that held the tips of the lines was laying on his
" left knee at the time he was making these mo-
" tions to Trainor. While that was so the horse ran
" at once directly to the team. When the horse
" reached the mules and got alongside of the mules
" the mules ran away, right straight ahead. The
" horse runs alongside the team about seventy feet
" and then turns to the left. The mule team ran
" on the right side as far as the ditch. They were
" stopped there. When the boy's horse started to
" run I saw him get hold of the line with both
" hands and try to hold the horse. When the mules
" were running I left the header."

He was then asked what became of Spina, and tells us that "He was thrown off at the time the mule team " was turned on the right" (51). He then goes on to describe his efforts to get hold of the lines and states that when the mule team was stopped "I went " back to the place where Spina was thrown off. See " him there. He was dead" (51). He then concludes his direct examination by stating that "From " my experience with mules, when mules are ap-
" proached from behind, from the rear, by another
" animal running, that would frighten the mule team.
" I had been working on the harvester twenty-two
" days before Spina was killed; during those twenty-
" two days, I saw Twining out there in the field near
" the harvester twice" (51).

The cross-examination of this witness consisted principally in reading in evidence as part of his cross-

examination, his testimony as given upon the first trial of this case.

The record here exhibits the fullest corroboration of the testimony of Salapi. In many material particulars, he is corroborated by Knight, the defendant's foreman: but he is equally thoroughly corroborated by Twining. It is true that as to the talk with Trainor and as to the slack reins Twining endeavors to exculpate himself: but the endeavor was not successful; and, after making due allowances for the position and testimony of one who is himself accused of negligence resulting in the death of a human being, Twining was constrained to tell substantially the same story as Salapi. In a word, if Twining told the truth, then Salapi did; and the jury, as they had a perfect right to do, adopted Salapi's testimony, and discredited and rejected that of Twining.

Illustrations of the corroboration of Salapi by Twining are numerons, as will be perceived by an attentive reader of the Record; and we shall therefore limit ourselves to but a few.

(a). At page 50 of the Record, speaking of the time when the horse was alongside the harvester, Salapi tells us that "the mules were walking also: " both the mules and the horse and cart were walking " straight in the same direction."

Twining describes the same situation at page 105 in the following language: "When I was alongside the " harvester, my horse was walking and the mule team

" was walking, too'; and on page 108, admits that he told O'Malley that his horse was facing the same way as the mules, "going the same way."

(b). At page 50, Salapi tells us, continuing his testimony, that "at that time while those things were " so, I saw Mr. Trainor; he jumps off the harvester. " He moves about two steps near the cart."

On page 101, Twining tells us that "the sack-sewer " got out and *started* to give me the count"; and on p. 105, states, "at that time, I was looking toward " the machine and the sack-sewer was getting out of " the harvester on the side I was on. He *started* " to go towards me."

(c). At p. 50, speaking of Trainor, the sack-sewer, Salapi tells us that "He moves *about two steps* near " the cart."

Upon this point, at p. 37, Albano tells us that " Mr. Trainor got off the harvester and went out to " the cart to give him (the boy Twining) the number " of sacks. Mr. Trainor was not at the cart when " the horse that was on the cart began to run away. " He was on the ground quite a ways off from the " cart." And Salapi is further corroborated by Twining himself who, at p. 105, tells us that the sack-sewer "*started* to go toward me"; and at p. 102 states that "he had not got up to my cart yet."

(d). At p. 50, Salapi tells us that "the lines from " the boy's horse were lying on top, loose, on top of

" the singletrees. He had the ends of the lines, the " extreme ends, the tips, in his left hand."

But where, from the beginning to the end of his testimony, and although his attention was specifically directed to this subject-matter with painful particularity, has Twining attempted to deny this statement? A very careful examination of Twining's testimony discloses, not only no denial of this crucial fact, but also declarations and statements that indirectly admit it—that cannot be rationally interpreted except upon the theory that the lines were loose. At p. 102, he told the Court that he did not remember how he was holding the lines when the horse was walking alongside the harvester and he had the lines in one hand: but if it be true, and he states it to be the fact, that he does not remember this, then his lack of memory upon this point deprives him of all capacity to contradict Salapi—for how could he undertake to question Salapi's statement of this fact when, as he admits, he has himself no memory or recollection of that fact?

At the top of p. 103, Twining tells us, speaking of the lines, that "I know that I had them tight enough " to keep the horse under control": but surely, this was the least he could say for himself; and if the statement were true, why did he not "keep the horse "under control"? We all know that the horse escaped from control, ran and frightened the mule team into running, and thus caused the death of the deceased: but these facts cannot be reconciled with the bald

assertion that "I know that I had them tight enough "to keep the horse under control." And Twining admits this at the bottom of p. 104, where he states, corroborating Albano and Salapi, that "From the "time the horse started to run *until I finally got it* "*under control,* I did everything in my power to con- "control the horse": if this be not an admission of the escape of the horse from control, and as much of an admission of that fact as anyone could reasonably expect from Twining, then we must confess that the English language has lost much of its significance. But could anything be more suggestive and significant, in this connection, than Twining's statement on p. 103, that "When the horse started to run, I grabbed "the lines with both hands and tried to hold them"? We beg of the Court to observe that it was "when "the horse started to run," that Twining "grabbed "the lines"; and we think it a very pertinent inquiry as to what was the position of those lines just before "the horse started to run," and where were those lines when Twining "grabbed" them? Twining states that "when the horse started to run, I grabbed the lines": but if the lines were not loose, and if it was true that "I know that I had them tight enough to keep the "horse under control" (103), where was the occasion or necessity to "grab the lines"? If the phrase "I "grabbed the lines" have any intelligent meaning, it must mean that Twining made a sudden grasp or seizure of the lines: if the word "grab" means any-

thing at all, it must mean that, and it was not used otherwise: could there then be than this a plainer admission that, just before "the horse started to run," Twining, not only did not have the lines "tight enough " to keep the horse under control," but also did not have the lines tight at all?

(e). Salapi tells us, at p. 50, that Twining "had " the ends of the lines, the extreme ends, the tips, in " his left hand."

But Twining nowhere denies that he had the lines in his left hand, and the only difference between him and Salapi upon this point is that Twining claims that he was sitting on the lines and "they hung down " the back about two feet" (103). But Twining distinctly admits that Salapi was correct about the hand that the lines were in, for he says, "I drove up to " the side of the harvester, and I had the lines in my " hand, *and I believe that I changed them to my left* " *hand,* and held them with my one hand, and turned " in my seat towards the harvester"; and he repeats this on p. 102, where he states that "when my horse " started to run I had my lines in my left hand and " was looking *back* towards the machine"; and also on p. 105, where he says, "The reins were in my left " hand, I changed them to my left hand."

(f). At p. 50, Salapi tells us that Twining "was " making motions to Billy Trainor with his right " hand."

But where has Twining undertaken to deny this?

Salapi tells us that Twining was talking to Trainor, but that he, Salapi, could not hear the words they said because of the noise of the harvester; and Twining does not remember whether there was any talk or not (109, 110): nor does Twining remember any of the surrounding circumstances except that Trainor got off the harvester and at that moment the horse started:

> "Q. Counsel asked you if, when you were
> " driving alongside of the harvester on that morn-
> " ing, and Mr. Trainor or whoever it was was get-
> " ting off the harvester to come towards you, if you
> " didn't say to him that your horse had run away
> " twice that morning, and, as I understood you
> " you stated that you didn't remember stating that.
> " A. Yes, sir.
> "Q. Well, did you state it?
> "Mr. Dunne—He says he does not remember.
> "The Witness—I don't remember. The only
> " thing that I remember is that he got off and at
> " that moment my horse started" (Record, p. 112).

But if these things be so, how could Twining undertake to dispute Salapi's statement as to the motions being made to Trainor with the right hand—the natural gesticulation so frequently incident to conversation? And the fact is that he did not dispute Salapi's statement, and that statement stands in this record wholly uncontradicted.

(g). At page 50, Salapi tells us, in speaking of Twining, that "his left hand that held the tips of the " lines was laying on his left knee at the time he was " making these motions to Trainor." But this is

merely another statement nowhere denied by Twining. Twining knew perfectly well whether his left hand was or was not on his left knee: he knew this as well as he knew that the lines were in his left hand: he knew this as well as he knew that when his horse started to run, he had the lines in his left hand "and " was looking *back* towards the machine" (102): but if his left hand were not upon his left knee, as Salapi relates, why did he not say so in plain terms?

(h). At p. 50, Salapi, speaking of Twining, tells us that "he was looking to Billy Trainor. I saw that " he was talking. I could not hear the words that " they said, because the harvester was making a noise. " The lines from the boy's horse were lying on top, " loose, on top of the single-trees. He had the ends " of the lines, the extreme ends, the tips, in his left " hand. He was making motions to Billy Trainor " with his right hand. His left hand that held the " tips of the lines was laying on his left knee at the " time he was making these motions to Trainor. " While that was so the horse ran at once directly to " the team."

Does Twining dispute this fact,—a fact by force of which his attention was diverted from the high-lifed and spirited animal that needed attention and that was in front of him, to the approaching Trainor who was upon his right side, and from whom he expected to receive the count of the sacks? At page 105, he tells us that "When I was alongside the harvester my

" horse was walking and the mule team was walking, " too. The reins were in my left hand. I changed " them to my left hand. At that time I was looking " toward the machine and the sack-sewer was getting " out of the harvester on the side I was on. He " started to go toward me. I was looking toward the " harvester. It was then that the horse ran." And at page 101, he says, "I drove up to the side of the " harvester, and I had the lines in my hand, and I " believe that I changed them to my left hand and " held them with my one hand, and *turned in my seat* " towards the harvester." At page 102, he adds the following significant and pointed remark, "When my " horse started to run I had my lines in my left hand " and was *looking back* towards the machine." Can there be any doubt that he permitted his attention to be distracted from this spirited animal which had just been roused by speed, zig-zags and circles,—a high-lifed animal that needed attention, and that needed attention particularly under those circumstances and when so near that mule team of whose susceptibility to fright Twining had been warned only three days before?

(h). At page 50, Salapi, after relating Twining's diversion of attention to Trainor, tells us that "while " that was so, the horse ran at once directly to the " team."

But here, again, Salapi is corroborated by Twining at p. 105, where the latter says, "When I was along-

" side the harvester my horse was walking and the " mule team was walking, too. The reins were in my " left hand. I changed them to my left hand. At " that time I was looking toward the machine and the " sack-sewer was getting out of the harvester on the " side I was on. He started to go toward me. I was " looking toward the harvester. It was then that the " horse ran." And this statement is reminiscent of the statement at p. 102, where Twining says, "When " my horse started to run I had my lines in my left " hand and was *looking back* towards the machine."

(i). At p. 50, Salapi tells us that "When the " boy's horse started to run I saw him get hold of the " line with both hands and try to hold the horse."

Here, again, he is corroborated by Twining, who admits, on p. 103, that "when the horse started to run, " I grabbed the lines with both hands and tried to " hold them."

Is it any wonder that the jury accepted the plaintiff's version of this unfortunate affair, and rejected that of the defendant? As judges of the facts, the jury had a perfect legal right to do this; and when we consider that the showing of the plaintiff was corroborated, both directly and indirectly, by the defendant's own witnesses, we see how it was impossible that the jury could have done otherwise than they did.

But this brief outline is not all. The prospectant features of the case render antecedently probable the contention of the plaintiff that the death of the de-

ceased was caused by the negligence of the defendant. The boy Twining was but a mere youth. He tells us himself that "On July 1, 1912, I was 16 years, 6 "months and 18 days old" (105); and since a man was not necessary to do the work which Twining was doing, no doubt the defendant found it more economical to employ a boy for that job. But the good sense of the jury no doubt discriminated between the man and the boy, and recognized the immaturity and lack of experience of minors. And without doubt, in determining the facts in the cause, the jury considered that minors are not only less capable of understanding the dangers of their employment, but they are also less capable of avoiding the dangers which they do understand (*Alpha P. C. Co.* v. *Curzi,* 211 Fed., 580, 586-7). And see also as to the inexperience of boys in the management of horses, the following cases:

D. H. Ewing & Sons v. *Callahan,* 105 S. W. (Ky.), 387;
McCreedy v. *Stepp,* 78 S. W. (Mo.), 671;
Bamberg v. *International Ry.,* 103 N. Y. S., 297.

Not only was Twining a mere youth, but there was nothing in the case to show any antecedent experience by Twining with animals generally, or in their management, such as would make him alert to the dangers associated with them. Nowhere in the case is there a syllable of evidence to show that Twining actually

had any real, prior opportunities to become, or that he was familiar, with horses, or mules, or mule teams or harvesters in general; or that up to June 27, 1912, he was a frequent visitor to *this* field, or *this* harvester, or was familiar with the harvester or its mule team, or its surroundings, or its associated dangers. The fact is, as Knight explained (38-9), Knight knew very little of him, was not well acquainted with him, did not pay much attention to him and had seen him only a couple of times in the field (38-9), although Knight had been in charge of that harvester and running it for the defendant for fully a month before Spino was killed (37-8). And Salapi saw Twining in that field only twice during the 22 days that he, Salapi, was working on the harvester (51). Nor has any denial been attempted to be made of Twining's unfamiliarity with this harvester, this field, this mule team or its associated dangers, or of the testimony of either Knight or Salapi as to the infrequency of Twining's visits to that field.

Not only was Twining an inexperienced boy, but there is nothing here to show that the horse used by him on July 1, 1912, and furnished him by the defendant, as admitted in that undenied portion of the amended complaint hereinabove quoted, was anything but a strange horse to him. Prior to July 1st, he had not any acquaintance or experience with that horse; and on July 1st, he made his first and only use of that horse, as plainly appears from the testimony of Mc-

Swain (97-8), and the direct admission of Twining himself on page 99, where he states that prior to July 1, 1912, "I had known nothing about this horse at all, "that was the first time I had driven it." There is not, therefore, a word here to show that Twining was acquainted with the disposition of that horse from any past association with the horse, or that Twining was in any position to be justified in taking any chances with that unfamiliar horse, particularly when in close proximity to an easily frightened mule team, and after the warning of June 27th. In a word, the fact of unfamiliarity with a horse, so far from excusing negligence in its management, only makes that negligence the more culpable (*Henry* v. *Klopfer,* 23 Atl. (Pa.), 337, 338). And it may be added that the fact that the horse ran away does not show that he was not liable to run away: indeed, a horse does not have to be vicious in the sense of biting or kicking, in order to run away; and very many horses not vicious at all in that sense do run away because the driver is not familiar with them or their proper management, or drives carelessly, or fails to restrain them, or loses control over them, or for other causes that due care could have guarded against. We submit that our views upon this subject-matter are fully and completely supported by the combined testimony of McSwain and Twining, the former of whom swears that while he had been using the horse in question in his painting business, which horse he describes as a "pretty

high-lifed" horse, Twining borrowed the horse for a single day, and that single day was the very day when Spino was killed (97-8); and the latter of whom admits in plain terms as already pointed out that he had no prior knowledge of this animal and that the fatal day, July 1, 1912, was the first time that he ever drove that animal.

Moreover: This strange horse was furnished to this inexperienced youth by the defendant. The Amended Complaint, in a passage in paragraph IV, already referred to, alleges that "On said 1st day of "July, 1912, said Twining was actually engaged in his "said employment, and for the purpose of enabling "said Twining to perform the duties of his said em- "ployment, said defendant furnished him with a horse "for use in that regard" (21). It is, we think, upon this point, enough to say that this allegation is nowhere denied by the defendant. But, again: Twining had antecedent knowledge of the danger of approaching this mule team in a heedless or careless manner. Knight, who was the defendant's superior employee, well knew the dangers incident to these mule teams: on June 27th, he had warned Twining concerning those dangers: Twining was careless and negligent at that time: he failed to take precautions to retain control over his horse; and, if Twining had been careful and prudent, Knight's warning then given to him should, and would, have been a vivid

part of his mental equipment on July 1st, particularly since he then had this strange and unfamiliar horse.

It is indeed among the plain and obvious facts in this case that, by reason of his experience on June 27, 1912, Twining well knew the danger of approaching a mule team from behind: he also knew that his cart had no brake, which was an additional reason for retaining a sufficient control over the recently excited horse: he knew that he had a strange and unfamiliar horse with which he should take no chances, whose conduct he could not forecast, and that therefore, again, prudence and vigilance were necessary: he knew that the field to his left, through which he had just sped, zigzagged and circled up to the harvester, was clear and open to him, and that, if he had turned into it, he would be taken away from the easily frightened mule team: he knew that he could readily have kept his horse and cart to the rear of the harvester, or could have attached it there, out of all sight, and hearing, of the easily frightened mule team; and all of these elements of knowledge were likewise part of his mental equipment on July 1, 1912. Since the horse that the defendant furnished Twining on July 1st was a strange and unfamiliar horse to Twining, and one with which, if prudent, he would not have taken any chances; since that horse did run away past the mule team, thus frightening it; since the mule team was peculiarly susceptible to fright, especially when suddenly approached

from behind by another animal; since these characteristics of the mule team were well known to the defendant and to other persons engaged in these farming operations (38); since they were well known to Knight, defendant's representative, whose knowledge was that of defendant; since Twining had been specifically warned only three days before; since Knight distinctly testifies that "so far as my observa-" tion of the facts occurring there on that occasion " permits, the harvester did not start Twining's horse " to run, nor did the mules themselves, so far as my " observation went, start Twining's horse to run; I " did not see any member of the harvester do any " act to start Twining's horse or the mules" (43):— in view of all this, was it not negligent on the part of this defendant to entrust this strange animal to the keeping of a boy not shown to have been experienced generally with animals, and not shown to have been experienced or familiar with the horse in question, and send him with this unfamiliar horse into an unfamiliar locality which he had visited only twice before, and where he would necessarily be brought into close proximity with an easily frightened mule team? To employ the language of the complaint, is that the way "to take reasonable and proper precau-" tions to protect said decedent"? Is that the way for the defendant to supply and provide proper, adequate and safe appliances and instrumentalities for the conduct of its operations? Is that the recog-

nized method of providing the decedent with a safe place of work? Was it not carelessness and negligence under all of these circumstances, on the part of defendant, "in causing and permitting said Twin- "ing to use said dangerous and frightening horse"? And do not these facts and circumstances show "neg- "ligence of defendant in failing and neglecting to "provide said Twining with such a safe and gentle "horse as would enable him to approach said har- "vester team without frightening it"? (Amended Complaint, Paragraph V).

The characteristics of Twining, then, were not such as to justify any inference regarding him favorable to the defendant. The state of the evidence before the jury was, and it was the business of the jury as the authorities already cited demonstrate, to draw the proper inferences and deductions from the evidence before them; and that evidence was such that the jury could well believe Twining to have been a young, inexperienced lad, not shown to have been accustomed to the use or management of horses, unfamiliar with mule teams and harvesters, rarely in the vicinity of the harvester and mule team in controversy, unresponsive to the admonition and warning of the experienced operator of the harvester, and handling on July 1st, for the first time, a strange, unfamiliar, and unproduced horse, which, while in charge of this same inexperienced youth, ran away, frightened the mule team and caused the death of the deceased.

But in addition to all of this, we submit that the concomitant features of the case exhibit a plain instance of negligence on the part of this defendant. We have seen that not only was Twining an inexperienced boy, but also that the horse was a strange and unfamiliar horse to him: what then was the character and equipment of this cart? It is plainly evident from the testimony that it was a "little cart" (36): it was not fitted with the simple precaution of brakes (*Choctaw, etc. Ry.* v. *Hollowey,* 191 U. S., 334); and it had but two wheels. If it should be objected that the absence of brakes is not in so many terms alleged as an element of negligence, the answer is two-fold: for, in the first place, the amended complaint (paragraph V) does in terms allege "the carelessness and neg- "ligence of defendant in failing and neglecting to "take reasonable and proper precautions to protect "said deceased"; and in the second place, the fact that evidence, or a fair inference from the evidence, tends to support a charge of negligence not alleged, does not render it improper as long as it has a material bearing upon the charge of negligence that is alleged (See for example, *Cohen* v. *Chicago, etc., Ry.,* 104 Ill. App., 314).

In the next place, it appears that the boy Twining was in the exclusive charge of this horse and cart. But Spino, the deceased, on the other hand, was upon a different appliance altogether: he had no voice in the selection of Twining, or his horse, or cart: he

gave Twining no orders; and he had no control over Twining.

And again, what are we to do about Twining's high speed, zig-zags and circles? On this subject, Twining testified that "Going across the field, I "walked my horse that morning" (100): and in this connection, he undertakes to describe the field in terms which we find difficulty in appreciating. Thus, he tells us that he went through the grain field, but "the stubble was all cut" (100): and a little lower down upon the same page, he makes the remark that "driving across the grain field it is usually plowed "up, and the cart would bounce to one side and the "other, and it would be uncomfortable to trot across, "and I usually walked my horse." Just what he means by the expression "I *usually* walked my horse," we cannot understand: "usual," as every High School Sophomore (110) knows, connotes a general course of frequent or habitual acts or events: but the uncontradicted testimony in this cause is that Twining was a most unusual visitor to that field, and had been there but once prior to the day of Spino's death. On cross-examination, when speaking of the field in which "the stubble was all cut" (100), he tells us that "the "field through which I came was plowed and for "that reason I walked my horse" (105); and the incongruity of all this seems to have been apparent to our learned adversary, for, on p. 110, we find him recurring to this topic, and Twining declaring that

" the field was plowed, I mean before it was planted. " It was not a freshly plowed field." This titubation was not lost by the jury; and the jury having rejected Twining's version of this catastrophe, as they had a perfect right to do, the facts as to Twining's speed, zig-zags and circles while crossing that field are, like the other facts in the cause, settled in favor of the defendant in error by the verdict. And the other testimony in the case leaves no doubt about the high speed, the zig-zags, and the circles indulged in by Twining as he approached through the field to the harvester. We are not dependent for these facts upon the uncorroborated testimony of Salapi: but, as usual in an analysis of Salapi's testimony, we find him fully corroborated by the testimony of the defendant's own foreman, Knight. But what need or occasion was there for this galloping, these zig-zags, or these circles, if this horse were all that the defendant claims it to have been, and if Twining were all that is asserted of him? Why this extraordinary and this unnecessary haste merely to obtain the count of the sacks? Why this unnecessary arousing of the blood in this high-spirited horse, this high-lifed horse, "that needs attention" (41), when no reason, occasion or necessity existed to compel such unusual procedure? Was anybody then dying on the harvester or near it? Was anybody then in need of medical attention there? Was the harvester on fire? What rational excuse can be extracted from the evidence in this case to ex-

plain these acts and this conduct on the part of this inexperienced boy of 16½ years? If there were no roadway in the field through which he came, that would furnish all the more need and reason for careful guidance of the horse by its driver: but nothing seemed to make any difference to this heedless, hair-brained slip of a boy,—because, as Knight points out, he was running over the checks in the field; and indeed, the boy himself admits that "I had to drive "and did drive right over the checks clear across the "field" (100). We submit that these acts of this boy were wholly unnecessary: they subserved no useful purpose: they were not compelled by the character of the ground over which he was coming; and while they do not suggest prudent carefulness, they do suggest the reverse. To what, then, upon the evidence in this cause, are these gymnastic performances to be attributed except Twining's youthful indiscretion, the unruly character of the horse and Twining's difficulty in controlling him after having excited and aroused him? But what comfort can this defendant derive from any one of these explanations? We submit that neither an unruly horse, nor an incapable driver, is as yet a justification for the killing of a human being.

The susceptibility of the mule team to fright is upon the evidence a postulate in this case; judicial notice is taken of the dangers associated with mules (*Southern Ry.* v. *Phillips,* 42 S. W. (Tenn.), 925; *Tobin* v. *Terrell,* 117 S. W., 290), and, as remarked

by the Supreme Court of Missouri, "the mule is a "domestic animal whose treacherous and vicious na- "ture is so generally known that even courts may take "notice of it. The defendant cannot be heard to claim "that he did not know of the treacherous and un- "reliable qualities of this animal" (*Borden* v. *Falk Co.*, 71 S. W. (Mo.), 478, 479); and the fact that the mule team became frightened and ran at the approach of Twining's horse from behind, is in itself evidence that to approach such a team in such a manner was a very dangerous and negligent thing to do. The truth is that when Twining reached the harvester, he became inattentive to his unfamiliar horse, carelessly allowed his attention to become distracted, and negligently lost control over the animal. After Twining's galloping, zig-zags, and two circles, he finally and at last got alongside the harvester: but since no claim can be made, in view of this verdict, or the testimony of the defendant's own foreman, Knight (43) that either the mule team itself, or the harvester, or any member of the harvester crew, started that horse to run, it plainly follows that the starting of the horse to run can only be attributed to Twining's failure to exercise proper care to preserve control over the animal, which failure or inadvertence is of the very essence of negligence. The defendant's answer denies that Twining's horse was a restive, fractious, frisky or vicious animal: it denies that the animal was not easily controlled: it denies

that the horse was liable to run away; and it denies that the horse was a dangerous animal with which to approach the harvester team, because of its frightening the mules, or for *"any other reason or at all"* (27). In the face of the testimony here, these denials plainly amount to nothing: but if, purely for the sake of the argument, we assume these denials to be well founded, and if it also be true that no cause for this runaway can be charged to the mules, the harvester, or the harvester crew, then the only cause left would be Twining's inattention and failure to control his horse.

And the facts bear this out: the situation was precisely one well calculated to bring about a careless loss of control over the horse that was particularly reprehensible and culpable in view of the warning given only three days before. What, indeed, was the course of events as disclosed in the testimony? It appears that when the horse and cart had reached a point alongside the harvester, they were not, at that point of time, going at a high rate of speed, but had slowed down to a walk, so as to obviously enable Twining to receive the count of the sacks from Trainor, as the defendant had employed him to do. At that time, as both Knight and Salapi tell us, the mule team was quiet: it was doing nothing whatever to frighten Twining's horse or to start it running. And here it is to be observed that Twining himself admits the truth of the testimony of Knight and

Salapi in this regard: because he tells us on page 105 that "When I was alongside the harvester, my horse "was walking and the mule team was walking, too." It is not, we submit, an extravagant or unreasonable assumption to make that, at this point of time, Twining's mind was naturally immediately concerned with securing from Trainor the count of the sacks: that was what Twining was there for: that was what the defendant employed him for: that was what he intended to do; and as the sequel shows, he was more concerned with obtaining that count than he was with the prudent and careful retention of control over this horse.

Moreover: at that point of time, Trainor had started to come towards Twining from the harvester: the harvester and the horse and cart were moving on parallel lines toward the west: the horse was in front of Twining, while the harvester was on his right side; and as Trainor left the harvester, Twining's attention was still further distracted from the horse to the approaching man from whom he expected to receive the count of the sacks. And Twining himself is compelled to admit these facts: he admits that his horse and cart were moving in the same direction as the harvester at a walk; and he admits that "at that time, I was *looking toward* the machine "and the sack sewer was getting out of the harvester "on the side I was on. He started to go toward me. "I was looking toward the harvester. It was then

"that the horse ran" (105). In other words, when Trainor started from the harvester towards Twining, Twining, with the horse in front of him, and the harvester on his right side, faced the approaching Trainor, and while looking at him, and away from the horse, the horse ran.

And at that point of time, when Trainor "started to go" (105) toward Twining, Twining's attention was further diverted from the horse to Trainor by the conversation that ensued between them. Salapi informs us of the fact of this conversation; and no reason has been exhibited here why Salapi should not have told the truth about this fact as he did about other facts,—no reason is shown here why, if Salapi told the truth about the other circumstances, he should falsify about this one; and Salapi was and is without motive or interest in this case. On the other hand, Twining declares, "I did not have any talk with the "man on the machine that got off the machine" (102): but in this connection it is proper to note that Twining, the person accused of the negligence which brought about the death of the deceased, and who has every motive in the world to seek to exculpate himself from that accusation (*Ernst* v. *Hudson River Ry.*, 35 N. Y., 1, 23 top, 24 bottom), makes a very unsatisfactory and self-contradictory statement concerning the talk between himself and Trainor at the crucial moment in this history. In one breath, as we have seen, Twining states that he had no talk with

Trainor: but, in the next breath, he admits that while in the office of Miller & Lux, with Mr. Wallis and Mr. Knight, after the accident, Mr. Wallis wanted to know how it was that this man was killed, and that Mr. Knight then and there charged him, Twining, with being responsible for the accident, and that Twining said nothing and remained silent (106); and on top of this, on page 109, he declares that he does not remember whether there was some little talk, at the time in question, between him and Trainor; and in addition to that, on page 110, of the Record, he tells us that he does not remember whether at the time when he was in his cart alongside the harvester, with the mules walking and his horse walking, and this sack sewer stepped out of the harvester and started to come towards him, right at that time, and just before the horse ran, whether or not there was a conversation between him and the sack sewer in which he said to the sack sewer that the horse had run away twice with him that very morning; and surely if there was any fact which this boy could remember correctly—if he does remember anything correctly—it would be the fact of this conversation which ensued at this time, while his attention was directed to Trainor and while he was expecting to receive the count of the sacks which the defendant had sent him out there to get.

But, as Trainor "started to go" (105) toward Twining, Twining had the reins in his left hand; and upon

this point, there can be no controversy, because Twining fully corroborates the statement of Salapi as to this fact. As the situation then stood, the reasons why Twining's attention was distracted from this high-lifed horse, this spirited animal which needed attention, and whose blood had just been aroused by the galloping, the zig-zags and the circles, but of whose disposition Twining was ignorant, were plentiful: there was his youthfulness and inexperience; there was his predisposition to carelessness as illustrated by his conduct in approaching the harvester through the field; there was his anxiety to obtain this count that he had been sent to get; there was the approach of Trainor; there was Twining's talk with Trainor at the crucial moment, when his attention was withdrawn from his horse and devoted to Trainor; there was the fact that, just at that instant, both the horse and the mules were then quiet and walking, and nothing was then, at that instant, happening to direct or compel immediate attention to them; and there was the fact of Twining's youthful indiscretion and carelessness, through which he took a fatal chance with a strange, high-lifed, excited horse, by letting the lines slip down. In a word, as Trainor started from the harvester, Twining naturally turned towards him, especially as there was conversation between them, thus diverting his attention from the horse and causing him to lose control over the animal by slacking the lines, which gave the horse his head, and allowed him to run, where-

upon all of the disastrous consequences followed. There was obviously a reason why that horse felt that he could run. He ran because he was a restive, fractious, frisky, vicious animal, not easily controlled, liable to run away, and a dangerous animal with which to approach a harvester team, because of frightening the mules: and he ran because Twining negligently allowed him to do so. No other theory, we submit, is authorized by the evidence: but upon this theory there can be no doubt about the responsibility of this defendant. If that horse was a dangerous animal with which to approach this easily frightened mule team, or if he were a horse which was not easily controlled, or a horse liable to run away, or was a restive, fractious, frisky or vicious animal, this defendant was plainly negligent in sending such an animal in charge of this inexperienced boy to such a place close to those easily frightened mules; and if, in addition to this, the boy Twining negligently lost that control which is exerted through the reins, and thus allowed the horse to run, this furnishes an additional ground upon which to base the responsibility of this defendant. The obvious result is that this tragedy is to be attributed to the dangerous character of this horse and to Twining's carelessness, inattention and diversion of attention from the horse to the approaching Trainor, whereby Twining lost control of the animal by slacking the reins, giving the horse his head, and allowing him to run, whereby the conse-

quence followed, in natural sequence, of the death of the deceased. It may be added that any claim that Twining was careful to retain control, is met, also, by the great distance that the horse ran before the lost control was regained: on cross-examination, Mr. Knight testified, speaking of Twining's horse, that "His horse ran about two hundred yards *before he* "*got control of it*" (47): Twining himself corroborates this by admitting that "The horse ran *until I* "*got him entirely under control,* I should say a block, "about 300 yards" (103): since the horse ran as far at least as two hundred yards, he plainly must have gotten his head very well, and had a good start, particularly since Albano tells us that Twining "was "holding the horse pretty strong" (36), and Twining himself admits, at page 103, "When the horse started "to run, I grabbed the lines with both hands and "tried to hold them"; and the distance that this horse ran before control was recovered, supports our claim, we think, that he was not under control as he should have been if reasonable care had been exercised by Twining.

The defendant would have us believe that this horse was the personification of meekness: but if that horse were so meek, if he were not unruly and liable to run away, and if Twining were a proper person to put in charge of him, why did not Twining continue to control him after he had got alongside the harvester and when the animal was in a walk? If, on the other

hand, this horse was so very meek, if Twining was exercising the care and control of a prudent and experienced driver, and if neither the harvester nor the mules, nor any member of the harvester crew did any act to start that horse, why did the horse run? If, as Knight says, and as Twining agrees, the mule team was quiet when Twining came alongside the harvester at a walk, if the horse also was then quiet and under proper control, and if Twining was careful and prudent to keep that meek horse under that proper control, why, in the name of all that is rational, did that horse run at all? We submit, that upon this defendant's theory, the running of that horse is inexplicable: but upon our theory, it is naturally explained by the inherently dangerous character of this high-lifed spirited animal that needed attention, and by this inexperienced boy's negligence in losing control over the horse by carelessly slacking the reins while his attention was diverted from the horse to Trainor. We submit the plain truth to be that the jury was entirely right in refusing to adopt the defendant's views and in rejecting them: because, upon any reasonable analysis of the evidence in this cause, what other inference was open to practical men except that this horse was a dangerous animal and liable to run away, and that Twining exhibited a minor's carelessness, negligently lost his control over the animal, and negligently permitted that animal to run. There was no other adjacent danger or cause to explain the starting of

Twining's horse except the liability of that animal to run, coupled with Twining's negligent loss of control. The evidence establishes that the starting of Twining's horse was not caused by the presence of the mules, or of the harvester itself, or by any act of any member of the harvester crew. Neither Trainor, nor Knight, nor Salapi, nor Albano, nor the harvester itself, did anything to frighten or to start either Twining's horse or the mule team: as Knight testified, and without contradiction, the ordinary noise of the harvester did not frighten either Twining's horse or the mule team; and while the mule team was accustomed to the regular noise of the harvester, yet it was peculiarly susceptible to fright when approached in the rear by another animal, particularly where that animal is traveling at a high rate of speed. When Knight lost sight of Twining, just before the runaway, both horse and mules were perfectly quiet and were walking. Hence, applying to the whole of the evidence the familiar logical process of exclusion and elimination, the only cause that is left to explain the running of Twining's horse is the inherent liability of that spirited animal to run, coupled with Twining's careless loss of control when his attention was diverted to Trainor,—a loss of control resulting from that carelessness so characteristic of a minor. And just here, we respectfully urge upon the Court, in accord with the authorities which have heretofore been referred to, that no countenance should be given to any attempt to

travel outside the record in this cause for the purpose of imagining or conjecturing other causes for the starting of this horse than those disclosed by the evidence: because that would simply be, we submit, in the first place, to imagine, guess or conjecture a possible other cause not exhibited in the evidence; and, in the second place, then to apply such other imagined, guessed or conjectured cause to this transaction, as if it had been proved instead of having been merely imagined, guessed or conjectured. And we further respectfully urge upon the attention of the Court the proposition that the restiveness of this horse is not the only charge of negligence made here: that there are other allegations formulated in the complaint; and that, as we have seen, where several acts of negligence are alleged, it is quite sufficient that some one be proved: it is not necessary to recovery that all should be proved. So that, whether this horse was restive or not, whether he was liable to run away or not, there can be no doubt about the duty of its driver, particularly in places where others are occupied in proximity to an easily frightened mule team, to keep his horse under restraint and control, to keep a lookout, and to exercise due care to prevent injuries to others; and whether this horse be restive or not, whether he be liable to run away or not, if there be a negligent failure to perform this duty, if there was, as alleged in the amended complaint, a neglect "to " take any precautions in the care and the driving of

"said horse to avoid the frightening of said harvester "team" (21 *ad finem*), and the horse ran away and caused death, a just liability, we submit, fairly arises. It is every-day common sense that, whether a horse be gentle or not, restraint and control must be maintained over him, particularly when in a situation in which he might cause injury or death; and if by reason of youthful indiscretion, or careless driving, or the lack of restraint, or the loss of control, or some other causes which due care should and would have guarded against, he runs away and kills an innocent man, we submit that it is no answer to say that the horse was not restive. In such cases, it is not necessary to show that the horse was restive: because one's own good sense makes it clear that a horse does not have to be restive in order to run away in a case where, by reason of youthful indiscretion, or careless driving, or lack of restraint, or loss of control, or other cause which due care would have guarded against, the horse is permitted to take, and does in fact take, advantage of such conditions to run away. And what we are concerned with in this cause is the demeanor of this horse on July 1, 1912, when in the exclusive charge of this inexperienced boy, near that harvester mule team, and with that only; and we respectfully insist that the demeanor of this horse at other times, at other places, under different conditions and surroundings, and when in charge of other and experienced men, affords no just inference as to his demeanor on July 1, 1912: his

conduct under one state of conditions would, we submit, be no evidence of his conduct under a different set of conditions; and it is quite common knowledge that the same animal may be quiet under one state of circumstances, but peevish under another. For example, evidence of a mare's conduct in a stable cannot be rebutted by evidence of her behavior in the street (*Brown* v. *Green,* 42 Atl., 991). And the general disposition of this horse, whatever that may or may not be, is not, in one sense, of special interest *so far as the frightening of the mule team is concerned:* because the evidence makes it clear that it is the rapid approach from behind, by another animal, no matter whether that other animal be gentle or not, which frightens the mules; and even the gentlest of horses, under such circumstances, would frighten a mule team.

And we submit that the retrospectant features of the case are, likewise, consistent with the plaintiff's contention, and inconsistent with that of the defendant below. What, indeed, we may ask, existed to prevent Twining from getting the count but avoiding the mules? If this horse were so gentle and meek, and if Twining were so careful and prudent, and if he had this horse so well under control, and if he had not lost control, what was there to prevent him from keeping to the rear or side of the harvester back of the sack-sewer's position? Twining had, or should have had, Knight's warning of June 27th, ringing in his ears: Trainor would have brought him the count, as he was prepar-

ing to do; and on receiving it, Twining could readily have turned about in that small two-wheeled cart, and gone back the way he came, without coming at all into dangerous proximity to those mules that he knew were easily frightened. Why did not this model of prudence adopt this simple and effective course, there being nothing to prevent him? There was no real necessity for Twining getting so close to the harvester as he did, or getting alongside of the harvester at all: there was nothing whatever, so far as the facts in this case permit us to see, to have prevented Twining, instead of going alongside the harvester, from keeping his horse and cart to the rear of the harvester, out of the way of all danger whatever, either to himself or to others, and following along behind the harvester, out of sight and out of hearing of the mule team: with no effort whatever, Twining could have done this thing, could have procured the count of the sacks, and then returned by the same way by which he came to the harvester, thus avoiding proximity to the mule team. If Twining, instead of placing his horse alongside the harvester, had placed his horse behind the harvester, there would have been much less probability of that horse running ahead, and the horse, with the obstruction of the harvester in front of him, would have been much more amenable to control; and there was no reason why Twining, if he had brought his horse to a place of safety in the rear of the harvester, could not as conveniently and expeditiously

have received the count of the sacks, as with his horse alongside the harvester, because, if Trainor, as Salapi tells us, was going towards the cart to give Twining the number of sacks (Trans., page 12, lines 15 to 21), there is no reason known to us why Trainor would not have done this quite as readily if the cart were behind the harvester instead of alongside of it. No reason consistent with Twining's proper control over that horse can be advanced to explain why it was necessary for his horse to have run away; and knowing the generally recognized fact that a mule team is highly susceptible to fright, and having received a very emphatic rebuke in that regard only three days before, Twining should, if he sincerely desired to avoid frightening the mule team and to avoid any accident consequent thereon, have kept his horse and cart to the rear of the harvester, instead of approaching that harvester in such manner as to bring his horse into dangerous proximity with the easily-frightened mule team.

And when Twining's horse started to run, why did not Twining jerk him sharply to the left? Knowing the danger of approaching the mule team from behind at a run, and having a clear field to his left, still, instead of turning his horse off sharply to the left, as he could have done with this horse so meek and gentle, he actually allows the animal to parallel the course of the frightened mules until *they* do the turning off sharply to the right; and he did this for at

least 100 yards. The character of the little cart would have facilitated a sharp turn to the left on one of its two wheels: after the damage was done by starting the mules, Twining could *then* turn to the left: why did he not do so upon the instant when the horse started, if that horse was so meek, and if he were so alert and careful? But he took no precautions and made no efforts even then to avert this disaster: he made no attempt to resort to an expedient which is not infrequently employed under similar circumstances; and all this was because he had carelessly lost control of the animal, had not then yet regained it, and so, through his own boyish carelessness, failed to take this ordinary precaution in due time,—in point of fact, he never grabbed the lines until the horse started to run, which was too late, admitting on page 103 of the record, *"When the horse started to run,* I " grabbed the lines with both hands and tried to hold " them."

What construction shall be put upon Twining's abrupt departure from the scene? Knight tells us that when the damage was done, Twining left the field and " did not return to the scene" (43-4): Twining tells us that after the damage was done he drove back, but not all the way back, only within talking distance (104): but here, as elsewhere, the verdict of the jury settles the facts in the plaintiff's favor. If Twining were not at fault, why did he leave the scene without offering help? This conduct, like that of flight in

the criminal law, is suggestive of fault and fault only, —of the guilty conscience: there was every reason why he should return: there was no reason but one why he should go. And we see that guilty conscience again exposed in that scene in the office where, in the presence of Wallis, Knight charged Twining with being responsible for the accident that caused this death, but Twining "said nothing and remained silent" (106). There is no pretense that he did not hear, comprehend and understand Knight's accusation—the fact that he remembered and admitted the occurrence establishes this: the truth of the facts embraced in Knight's statement was within Twining's knowledge: he was at perfect liberty to make a reply—in fact, Wallis was desirous of replies; and the accusation was made under such circumstances and by such a person (an eye witness) as naturally to call for a reply, and for a denial if he did not intend to admit it. Surely, if Twining were innocent of Knight's accusation, that was the time and place in which, and those were the circumstances under which, we should expect him to proclaim that innocence with vigor and persistence,—but he "said nothing and remained silent." Thus, as Hamlet hath it, "conscience does make cow-" ards of us all." And in line with this conduct is the fact that from the date of this death on July 1, 1912, until May 18, 1915, no word of explanation ever was uttered by Twining, either at the Coroner's inquest, or upon the former trial of this case, although no

satisfactory reason appears to show that he was inaccessible to the defendant upon either of those occasions: never before prior to May 18, 1915, almost three years after the death of Spina, so far as the evidence advises us, has Twining broken his silence by an explanation of any sort.

We respectfully submit that it clearly results that, in addition to the direct testimony of Albano, Knight and Salapi, a fair consideration of the whole evidence leads to the conclusion of negligence,—a conclusion which is strengthened, we think, by every fair inference from the facts developed. Twining and his horse and cart were a necessary instrumentality of the defendant's business: on July 1, 1912, this instrumentality was in a position where it could have brought about this death: it was adequate, as the sequel showed, to bring about that death: no other agency is shown by the evidence to have caused this death: no other agency can be imagined, or guessed at: no fault of the dead man anywhere appears; and that death, we submit, would never have occurred if Twining had exercised only a fractional part of the ordinary prudence that the law requires. We submit that it is impossible to excuse this defendant for sending that inexperienced youth, with that unfamiliar horse, to an unfamiliar scene, and into dangerous proximity to an easily frightened mule team.

And in addition to the direct testimony of Albano, Knight and Salapi, when we pass in review Twining's

youth; his lack of experience with animals and harvesters; the use by Twining of an unfamiliar horse on July 1, 1912; the well known susceptibility of the mule team to fright; the absence of any proof that Twining's horse was frightened by the mules, the harvester, the harvester crew, or any other adjacent danger or cause aside from Twining; the exclusion and elimination of all other assignable causes, except Twining's negligence; Twining's negligent loss of control over the horse by slackening the governing reins while his attention was diverted to Trainor; Twining's guilty behavior in departing from the scene without offering help; the absence prior to this second trial of any explanation by him—good, bad or indifferent; and all the other facts and circumstances in the case—when all these things are considered, together with all reasonable inferences to be drawn from them; when they are all taken together as they should be, both in connection with the testimony of Albano, Knight and Salapi, and also independently of it; and when that jury applied to these facts their good, practical common sense, can anyone say that they should have hesitated in drawing the inference that, through the culpable negligence of this defendant, this human life was snuffed out.

In an Oklahoma case where there was no eye witness whatever to the origin of the fire which caused the death of the plaintiff's wife and two children, the Supreme Court of Oklahoma in rejecting the con-

tention that the facts were not sufficient to justify the conclusion of negligence, and in affirming a verdict in favor of the plaintiff for $14,500, said:

> "We think that where a known agency is known to exist which is sufficient and liable to produce the result complained of, and is traced to a position in which it might produce such result, and the result has been produced, and there is no other known agency at that point capable of producing such a result, a strong inference is raised that such known agency was the proximate cause of the injury that follows."

Waters-Pierce Oil Co. v. *Deselms,* 89 Pac. (Oklahoma), 212, 216.

In this case, the Supreme Court of Oklahoma went very fully into the right of a tribunal to infer the existence of an ultimate fact from the probative facts shown on the trial of the cause: but the Oil Company was not satisfied with the affirmance of the judgment by the Supreme Court of Oklahoma, and prosecuted a writ of error to that court from the Supreme Court of the United States, and there renewed, repeated and amplified most of the contentions made before the Supreme Court of the State. The Supreme Court of the United States, however, after a brief discussion declared that:

> "It is not unnecessary to further elaborate the subject, because of the very full and accurate re-

view of the tendencies of the proof in relation to the matter made by the court below in its opinion";

and affirmed the judgment.

Waters-Pierce Oil Co. v. *Deselms,* 212 U. S., 159, 176-7.

THE ASSIGNMENTS OF ERROR CONSIDERED SERIATIM.

The Assignments of Errors fail to exhibit affirmatively any error calling for a reversal of this judgment.

The plaintiff in error has filed herein 27 assignments of error, and these assignments are susceptible of classification. Thus, assignments numbered from I to IX, inclusive, and assignments numbered XXIV and XXV, deal with alleged errors said to have been committed during the course of the trial below. Assignments numbered from X to XXIII, inclusive, deal with alleged errors said to have been committed with respect to the charge to the jury in the trial Court. Assignment Number XXVI deals with the alleged insufficiency of the evidence, and in that regard, contains eighteen subdivisions. And assignment numbered XXVII deals with alleged error in the verdict rendered in favor of the plaintiff and against the defendant. We shall endeavor to discuss these assignments as briefly as possible, following their numerical order.

Assignments Numbered I to V.

Assignments numbered from I to V may be conveniently dealt with together, inasmuch as they are concerned with the same subject matter. We have heretofore offered some suggestions as to the insufficiency of these assignments, considered from the point of view of the rules which determine how an assignment of error shall be made up. We wish now to point out that, granting for argumentative purposes only, the sufficiency of these assignments, still, they are not valid in substance. We submit that a knowledge of the facts out of which a duty springs is an element in determining whether there has been any negligence, and especially so in determining the care to be exercised; and where knowledge on the part of a defendant of a defect or danger is shown, negligence may be inferred,—as where the defendant's servants had been warned (*Allis Chambers* v. *Reilley Co.*, 143 Fed., 298; *O'Neill* v. *Blase,* 68 S. W., (Mo.), 764). The rule seems to be that any facts tending to show knowledge by or notice to a defendant of a defect or danger, are admissible; and it is upon this principle that it is competent to show complaints or warnings to the defendant or its representatives (*Smith* v. *Whittier,* 95 Cal., 279). In *Smith* v. *Whittier,* just cited, the Supreme Court remarked:

> "As negligence is the violation or disregard of
> "some duty or obligation which one owes to an-
> "other, it is evident that a knowledge of the facts

"out of which the duty springs is an essential ele-
"ment in determining whether there has been any
"negligence. In certain relations, such knowledge
"is conclusively presumed, while in others it de-
"volves upon the party charging the negligence
"to show that the knowledge existed. Especially
"is such knowledge an element in determining
"the care to be exercised in the use of some me-
"chanical or natural agency, whose superior force
"demands skill in its management, to prevent its
"getting beyond ordinary control. The amount of
"care requisite in such a case depends upon the
"extent to which the knowledge goes. The mode
"in which an appliance involving such agency is
"to be used is as material as the manner in which
"it is constructed, and if one mode of its use is
"free from danger and another not, it is relevant
"and material to show whether the defendant
"knew how to use that mode which was free from
"danger, since his knowledge of the proper mode,
"and his failure to exercise it, would be evidence
"of negligence. 'Facts which were known to him,
"or by the use of proper diligence would have
"been known to a prudent man in his place, come
"into account as part of the circumstances.' (*Pol-
"lock on Torts,* 356). . . . Whenever the
"knowledge or information of the party charged
"to have been negligent is a factor in determining
"such question, it is proper, for the purpose of
"showing such knowledge or information, to show
"that notice was given to him, and that he was
"informed of the facts which would constitute
"negligence; and there is no better mode of show-
"ing this than by the evidence of the party himself
"that he had received the information. . . .

"Upon these principles, when Ravekes was told
"in what way the elevator should be run, and
"what would be the consequence of running it
"otherwise, the receiving of that instruction be-

"came a distinct fact in the case, and could be "shown by any one who heard it. His own ad- "mission, whether upon the record or as a witness "at the trial, that such instruction was given him, "obviated the proof by any other witness, but "cannot be considered as hearsay. 'As matter of "evidence and practice, proof of actual knowledge "may be of great importance. If danger of a "well-understood kind has, in fact, been expressly "brought to the defendant's notice as the result of "his conduct, and the express warning has been "disregarded or rejected, it is above hearsay, and "more convincing to prove this than to show in "a general way what a prudent man in the de- "fendant's place ought to have known.' (*Pollock* "*on Torts,* 356.)"

Smith v. *Whittier,* 95 Cal., 279, 291-2, 294.

It was, therefore, proper to bring home to the present defendant, through its representatives, Knight and Twining, knowledge of the danger of approaching a mule team from behind: this evidence established antecedent knowledge by the defendant of this danger, long before the death of the deceased; and evidence of notice to the defendant, before the death, of the nature of the dangers to be apprehended, or of the unsafe practices he was employing, is always competent upon the issue as to negligence.

Sunny v. *Holdt,* 15 Fed., 880, 882-3;
N. Y. El. Eq. Co. v. *Blaine,* 79 Fed., 896;
Allis Chalmers Co. v. *Reilley,* 143 Id., 298;
Griffen Wheel Co. v. *Smith,* 173 Id., 245, 247;
Leonard Co. v. *Highbarger,* 175 Id., 340;

Fed. Lead Co. v. *Lohr,* 179 Id., 692;
Am. Shipbuilding Co. v. *Lorenski,* 204 Id., 39, 44;
Locorazza v. *Cantalupo,* 210 Id., 875, 877;
Casement v. *Brown,* 148 U. S., 615, 623-4;
Franklin v. *Angel,* 76 Pac. (Wash.), 84;
Clowdis v. *Fresno Flume Co.,* 118 Cal., 315.

And here it may be noted that *Clowdis* v. *Fresno Flume Co., supra,* has been considered authoritative in the following cases:

Baker v. *Borello,* 136 Cal., 160, 163;
Kippen v. *Ollasson,* Id., 640, 641;
Gooding v. *Chutes,* 155 Id., 620, 623;
Pacific Lumber Co. v. *Wilson,* 6 Cal. App., 561, 562.

We submit, therefore, that the lower court was entirely right in permitting the plaintiff to show that the defendant knew that to permit another animal to go up alongside the mules "might cause a runaway, " and kill somebody, or some of the mules tear up " the machine."

On pages 35-37 of the Brief for plaintiff in error, certain matters are referred to by the plaintiff in error as being "collateral matters"; and in that connection, it is claimed that the evidence of Mr. Knight as to the occurrences of June 27, 1912, was immaterial, that such evidence was not competent for the purpose of proving negligence, but only to show

Twining's knowledge that it was unsafe to leave the horse unattended, and since Twining did not leave the horse unattended on the day of the accident, the incident has no weight; and it is also claimed that the manner in which in approaching the harvester Twining came between a run and a gallop, zig-zagging and circling the horse, is likewise immaterial, because none of these things in any way frightened the mules. In connection with the last point, it is suggested that "the field was a checked field, which "would account for the zig-zagging of the driver" (Record, pages 100-101): but aside from this remark conceding the "zig-zagging of the driver," there is no evidence, either at the place cited or elsewhere in the Record that we can recall to the effect that the "zig-zagging of the driver" was accounted for by the field being checked; and we do not understand on what principle in support of this unauthorized statement reference should be made to the testimony of a witness whose version of the transaction in question the jury declined to believe. That the occurrence of June 27, 1912, was proper to bring home to the defendant and its representatives knowledge of the danger of approaching an easily frightened mule team from the rear, we have already discussed and cited the appropriate authorities; and this view seems to be conceded by the plaintiff in error at page 36 of its brief, as we read the same. As we have made clear, this evidence was not offered to show

negligence on July 1st, but to satisfy the jury that the defendant and its representatives knew and understood the danger of approaching a mule team from behind: for this purpose, upon all the authorities, the evidence was plainly relevant and proper; "but "it was the duty of defendant, if (it) desired the "limitation to be placed on the evidence, to ask the "court for an instruction to that effect. This (it) "failed to do, and it is too late now to make com- "plaint for the first time" (*Liebrandt* v. *Sorg,* 133 Cal., 571, 573). We wish, however, to dispute the assertion of the plaintiff in error that "Twining did "not leave the horse unattended on the day of the "accident." It may be that the boy did not leave the horse unattended, in the sense, and in the sense only, that he did not get out of the cart: but in every other element which goes to make up the concept of inattention, that horse was as completely unattended as if the boy were at the North Pole. When we speak of attention to a horse, particularly when we speak of attention to a high-lifed, spirited animal that Knight declared "needed attention," and when we speak of attention to such a horse which has just been roused and excited and whose blood was up, we mean something more than the boyish carelessness which permits the lines to slip negligently down upon the singletree while his attention is diverted from the horse in front of him to the approaching man at the side of him: if we mean anything in this

connection, we mean an active, prompt, alert, ready and undivided supervision and control over the excited, nervous and spirited animal which needed attention.

The mere bodily presence of the boy in the cart at the time in question was not the attention called for by that care and prudence which the law requires: the negligent loss of control over the animal by carelessly letting the lines fall down upon the singletree while the boy's attention was distracted to Trainor whom he had in conversation, with his face and eyes turned away from this spirited animal, was not the attention called for by that care and prudence which the law demands; and if it be claimed that this horse was attended by this boy on this occasion because, forsooth, the boy did not get out of the cart, we shall have the greatest difficulty in conveying a negative sufficiently emphatic to do justice to our feelings without the use of language inconsistent with the dignity of this court.

As to the claim made on pages 36-7 of the Brief of plaintiff in error that the evidence as to the manner in which the boy approached the harvester across the field should be discredited because the mules were not frightened thereby, we have already stated our views in reviewing the facts in this cause. The issue in the case was an issue of negligence, and the asserted negligence had to do, among other things, with that instrumentality of the defendant's business

which was composed of the boy, the horse and the cart. The mules were particularly susceptible to fright by reason of the sudden approach of another animal from behind: the horse which the boy was driving was a high-lifed, spirited animal which needed attention: the condition of that horse at the time when it ran was a most important and material feature of the existing situation; and the difference in effect upon a high-lifed and spirited animal between driving him up gently to the harvester, and driving him rapidly at a gait between a run and a gallop, with accompanying zig-zags and circles, must be plainly obvious to any reasonable man. In point of fact, the boy's speed, zig-zags and circles made such an impression upon Knight that he went to the harvester brake: "When I saw him approaching " in the way I have described through the field, ap- " proaching the harvester, I went down to the brake " on the harvester" (Record, p. 42); and this conduct could not have failed so to excite that high spirited horse that the failure thereafter carefully to guard him was wholly indefensible.

Assignment VI.

In this assignment, the defendant complains because the probate record in the matter of the estate of the deceased, was received in evidence in the court below. This assignment, we submit, upon its face, shows its insufficiency in point of substance. There can be no

doubt but that there was an issue raised by the pleadings as to whether the plaintiff in the action was duly appointed the administrator of the estate of the deceased; and upon that issue, the proceedings in the local probate court were plainly and clearly relevant. The only objection made to the receipt of this record in evidence was the highly technical one "that the "probate proceedings were in the name of the estate "of Peter Spino, deceased, whereas the name of the "decedent in this case was Pietro Spina." But the most cursory examination, whether of the probate record, or of the pleadings and testimony in this cause, will show that the deceased was known both as Pietro Spina and also as Peter Spino. The caption of the Amended Complaint was "Saverio di "Giovanni Petrocelli, as Administrator of the estate "of Pietro Spina, sometimes known as Peter Spino, "deceased" (17): the caption of the answer in this cause is entirely the same (25); and an examination of the probate record will show that the deceased was known by both names (55-84). Albano refers to the deceased by both names. On p. 35, he tells us that "I knew Pietro Spina, or Peter Spino, in his life-"time": he tells us that "Pietro Spina" was driving the mule team; and he tells us that he was on the harvester when "Peter Spino" was killed: on the first line of p. 36, he speaks of "Peter Spino"; and on the line preceding the last, he refers to the dead body of "Pietro Spina." And on p. 37, he refers twice to the

deceased as "Spino," and once as "Pietro Spino." And so, likewise, with Knight. On p. 39, he refers to the deceased by both names "Spina" and "Spino"; and Salapi, also, on p. 53, calls the deceased by both names, "Pietro Spina" and "Pete Spino." Wallis does not mention the name of the deceased, nor does Safford, McSwain or Miller. Twining speaks of the deceased as "Spina" during his cross-examination. There may be in the Record other illustrations which have escaped us, but these, we submit, sufficiently support our claim that the deceased was known by both names, even if we wrongly assume that the names are not *idem sonans* (*Faust* v. *U. S.,* 163 U. S., 452). Nowhere throughout the Record in this cause is a single fact to be found which in the mind of any reasonable person could throw any doubt or uncertainty over the identity of the deceased; nor can there be found in this Record a single fact to justify any reasonable person in believing for an instant that the defendant below was in any way deceived or misled as to the identity of the man that it conceded was killed on its premises on July 1, 1912.

It may be as well to refer here as elsewhere to that portion of the brief for the plaintiff in error included within pages 42-49, wherein the claim is made, for the first time in the history of this litigation, that there was no evidence that the deceased was either the husband of the widow or the father of the child. In this connection, we respectfully refer to the pro-

bate record generally and particularly to the powers of attorney therein contained appearing on pages 65-71 of that record; and also to the colloquy which went on between the court and counsel which appears on pages 84 and 103-4 of the Record; and also to the testimony of the widow herself which appears on page 85 of the Record; and also to the utter and complete absence of any qualification whatever either of any of the facts apparent at the places referred to, or of any of the inferences which may fairly be drawn from those facts. It is to be observed, that the objections now presented were not made in the court below, and that they are suggested now in this Appellate Court for the first time. If the objection now made, assuming it to have any value, had been made at the trial, it could readily have been obviated: by failure to present these objections at the trial, they were waived; and a party cannot allow evidence to be offered or introduced at a trial without specific objection, and afterwards upon an appeal make an objection which might have been obviated if he had made it when the evidence was offered. In support of this proposition, in addition to the authorities already cited elsewhere in this brief, see:

Flournoy v. *Lastrapes,* U. S. S. C., 25 L. Ed., 406;
Morrill v. *Jones,* 106 U. S., 466;
U. P. Ry. v. *Myers,* 115 Id., 1;
N. Y. Ry. v. *Estill,* 147 Id., 591;

Wasatch Mg. Co. v. *Crescent Mg. Co.*, 148 Id., 293;
Chicago etc. Ry. v. *DeClow*, 124 Fed., 142;
Foltz v. *St. Louis etc. Ry.*, 60 Id., 316.

In the next place, this portion of the brief argues, in substance, that there was no evidence of the identity of the deceased as the husband of the widow or the father of the child because of sundry differences in the spelling of these foreign names. But great latitude is allowed in the spelling and pronunciation of proper names, and in all legal proceedings, whether civil or criminal, if two names are sounded substantially alike, a variance in their spelling is immaterial. Indeed, the difficulty which, "grows out of the "impossibility of applying a general rule where there "are so many varying methods by which men's names ". . . are designated," is fully recognized (*Kreitlein* v. *Ferger*, 238 U. S., 21, 28-9). Sometimes the courts apply the rule of *idem sonans* and sometimes they argue that the true test is not whether the names sound the same to the ear when pronounced, but whether they look substantially the same in print: but the Supreme Court looks at this matter in a purely practical way, remarking that "we need not con- "fine ourselves to the test of *idem sonans*, nor to the "appearance of the name in print, but may employ "both of these, with such additional tests as may be "available in view of what is disclosed by the record" (*Grannis* v. *Ordean*, 234 U. S., 385, 395-398): but in

the cause at bar, we submit that all three of these tests combine to fix the identity of the deceased as the husband of the widow and the father of the child: that is to say, the test of *idem sonans* and the test of the appearance of the name of Spino and Spina in print, and the test of the disclosures of the record, show beyond all question that this plaintiff in error, who passed through two trials of this cause before attempting to make this point, never was deceived or misled as to the identity of the deceased as the husband of the widow and the father of the child (compare also *Bennett* v. *U. S.*, 227 U. S., 333, 338).

It must, of course, be remembered that what we are dealing with here are foreign names, and inasmuch as the sound constitutes the name of an individual, it would seem that any combination of English letters which will approximately produce that sound ought to be sufficient to bring the variant names within the rule of *idem sonans.* In *Beneux* v. *State,* 20 Ark., 97, the court, in holding Beneux and Bennaux *idem sonans,* said:

> "It is insisted by counsel that Beneux is a French "name and that according to the rules of ortho- "graphy and pronunciation in the French language "is widely different in sound from Bennaux. It "may be replied, that however that might be to "the ears and understanding of a Frenchman, the "names would seem to be *idem sonans* according "to our language."

And in *Galveston, etc. Ry.* v. *Sanchez* (Tex. Civ.), 65 S. W., 893, the court, in holding Celia Sanchez and Selia Sanchez *idem sonans,* used the following language:

> "The names were *idem sonans* from that stand-
> " point of the English language, and it does not
> " matter, whether they were so or not in a foreign
> " language. Nor was there any evidence offered
> " as to the Spanish pronunciation of the names,
> " and the court would not judicially know that
> " such pronunciation was different from our own."

So, also, in *Chiniquy* v. *Catholic Bishop,* 41 Ill., 153, the court, in holding that the French name Michael Allaine was *idem sonans* with Mitchell Allen, said:

> "When we consider the great influx of foreign
> " population into our country and the great dif-
> " ficulty existing on the part of those courts as well
> " as the people generally who are not familiar with
> " the language of the country from which it comes,
> " to understand the names, whether written or
> " spoken, by which they are severally distinguished,
> " we should be slow to pronounce that a variance
> " in the name of any one of them, unless it is
> " palpable, which may only be a misspelling or a
> " mispronunciation of it, and that by persons igno-
> " rant of the language in which the name is writ-
> " ten."

So in *Petrie* v. *Woodworth,* 3 Caines (N. Y.), 219, the court held the French name Petris and its English equivalent Petrie *idem sonans.* The court in *State* v. *Timmens,* 4 Minn., 325, took the view that if the English spelling could be pronounced in the French

language so as to give the same sound as the French name that it was not a misnomer. In that case, which was a prosecution for seduction, the name of the prosecutrix was alleged in the indictment as Forest, while the evidence showed it to be Fourai. The defendant was familiar with the French language. The court said:

> "The name Forest is pronounced in French as if "it was spelled Foray, which is almost identical "in sound with the name of the girl as proven at "the trial, which was Fourai; and the Christian "name being the same, the defendant could not "have been misled or in any manner prejudiced by "the misspelling."

And in *Metz* v. *McAvoy Brew. Co.,* 98 Ill. App., 592, the court, while holding Metz and Meetz *idem sonans,* said:

> "They are German names and in pronunciation "are very similar in sound, the letter 'e' in Metz "having very much the same sound as the letter "'a' in such English words as 'pate,' 'rate' or 'fate.' "The sound of the letter 'e' in Meetz being doubled, "is merely prolonged."

See, also, *Gorman* v. *Dierkes,* 37 Mo., 576, where the German name Doerges was held *idem sonans* with Dierkes and Dierges. And *Rape* v. *State,* 34 Tex. Cr., 615, 31 S. W., 652, where the Mexican name Garzia was held *idem sonans* with Garcia. Also, see *Brown* v. *Quinland,* 75 Mich., 289, 42 N. W., 940, where Che-gaw-go-quay, and Che-gaw-

ge-quay were held *idem sonans.* In *People* v. *Fick,* 89 Cal., 144, 26 Pac., 759, the court refused to say, as a matter of law, whether Toy Fong and Choy Fong were *idem sonans,* but said that it was a question for the jury. So, also, in *Boyce* v. *Danz,* 29 Mich., 148, the court said that the question whether Boyce and Bice were commonly pronounced alike was a question for the jury.

It may be added that the courts have very consistently regarded with extreme disfavor the practice of raising objections for the first time in the Appellate Court. The practice is so unfair to the court below and to opposing counsel, that it deserves the emphatic condemnation which it has always received. We have already referred to the opinion of one federal judge referring to what he describes as a "rattle of words" (*N. Y., etc. Co.* v. *Blair,* 79 Fed., 896); and for another example of the attitude of the courts upon this subject matter, we respectfully call the attention of the court to *Slaughter v. Goldberg, Bowen & Co.,* 26 Cal. App., 389, 324-326, where it was held that the failure of the complaint in a cause of action for death to show the existence of the "essential element" of heirs was waived by going to trial in the court below without any distinct and precise objection based upon this specific point, and where the Appellate Court quoted with approval from *T. & P. Ry.* v. *Lacey,* 185 Fed., 226, where the Circuit Court of Appeals condemned similar conduct, and criticised the practice

by which a point "was held in ambush till the case " reached this court, when it came out in the open. " We think it too late to present that defense."

We have just been dealing with what we cannot help but regard as a mere quibble over the names Spina and Spino; and, while upon that subject, may just as well offer a few suggestions as to some other matters of cognate character which are referred to in the brief herein on behalf of plaintiff in error. We think that this may as well be done now, so that this entire subject-matter may be dealt with principally in one place. In the brief for the plaintiff in error, the claim is made between pages 49 and 51 that the Record fails to show that the lower court had any jurisdiction of the case made by the Amended Complaint, and that, for this reason, the judgment should be reversed. In this connection, it is said that "the " original complaint showed no diversity of citizen- " ship": but that was not necessary, since the original complaint shows upon its face that it was filed in the State, but not in the Federal Court, and that it was not invoking the jurisdiction of the latter court. But, in this connection, it is also said that "the petition " for removal alleged that defendant was a citizen " of Nevada, and the plaintiff Nordgren was a citi- " zen of California, and Jovetta Spino and Sunda " Spino were subjects of the Kingdom of Italy. On " these allegations the case was removed" (Brief, p. 49). It further appears, from page 13 of the Record,

that, on September 14, 1912, the "Certified Transcript "of Record on Removal from Superior Court of Mer- "ced County" was filed in the office of the Clerk of the Court below: that this record consisted of "the "complaint, petition for removal, bond on removal, "notice of filing petition for removal, demurrer, and "order of removal" (See Certificate of County Clerk of Merced County, Record, p. 12); and that the præcipe for transcript of record on this writ of error, filed herein on behalf of the plaintiff in error, enumerated, not the entire contents of the "Certified "Transcript of Record on Removal," but only a portion thereof, to wit, the complaint and demurrer (See Note by Clerk, Record, p. 13; Præcipe, Record, p. 162). But that the cause was removed from the State to the Federal Court, there can be no question: the record here evidences that; and the plaintiff in error tells us that "The defendant (below) caused the case "to be removed into the United States District Court "on a petition alleging that the defendant was a citi- "zen of Nevada and the said heirs to Spino were "subjects of the Kingdom of Italy" (Brief, pp. 1-2). In addition to all this, there is on file in this court a stipulation supplying the omission from the Record of the remaining portions of the "Certified Transcript "of Record on Removal from Superior Court of "Merced County"; and the whole of that Transcript is now available. Removal proceedings are in the nature of process to bring the parties before the Fed-

eral Court; and when that result is accomplished by voluntary action, the court will not of its own motion inquire into the regularity of the procedure where no seasonable objection thereto has been made (*Mackay* v. *Unita Dev. Co.,* 229 U. S., 173, 176): but upon what principle of fairness, a defendant who was the sole actor in the removal proceeding, and who alone procured the removal of the cause into the Federal Court can base a claim upon an alleged imperfection in his own handiwork, we are unable to understand. Modern views on the subject of removal proceedings have grown more liberal (*Kinney* v. *Columbia S. & L. Association,* 191 U. S., 78); and while it is often said that consent cannot confer jurisdiction, still "the "parties may admit the existence of facts which show "jurisdiction, and the courts may act judicially upon "such an admission" (*Pittsburg, etc. Ry.* v. *Ramsey,* 89 U. S. (22 Wall.), 322); and "it is no infringe- "ment upon the ancient maxim of the law that con- "sent cannot confer jurisdiction to hold that, where "a party has procured the removal of a cause from a "State court upon the ground that he is lawfully "entitled to a trial in a federal court, he is estopped "to deny that such removal was lawful if the federal "court could take jurisdiction of the case, or that the "federal court did not have the same right to pass "upon the questions at issue that the state court "would have had if the cause had remained there" (*De Lima* v. *Bidwell,* 182 U. S., 1, 174). That the

consent of the parties may be looked to in a removal proceeding is illustrated by a recent case where the Court said that "We think both parties did so consent " (to the District Court retaining the action), the " defendant by filing the petition for removal and the " plaintiff by proceeding with the trial of the cause, " and at no time objecting to the jurisdiction" (*Phila. etc. Co.* v. *Keslusky,* 209 Fed., 197, 199; and see also *Wm. H. Perry Co.* v. *Klosters,* 152 Id., 967, 969).

In a removal proceeding of the present class, diversity of citizenship is of primary importance to the defendant; and the burden is upon the removing defendant to show, in its petition, the essential facts necessary to give the federal court jurisdiction (*Fishblatt* v. *Atlantic City,* 174 Fed., 196). The jurisdictional facts must appear from the petition for removal; it is this petition which divests the State court of jurisdiction and invests the federal court with jurisdiction (*Johnson* v. *Butte Co.,* 213 Fed., 910); but " while it is true that the facts necessary to give the " federal court jurisdiction must affirmatively appear, " no precise and technical form of words is required, " and it is sufficient if the necessary facts appear in " the record, although stated inartificially and not in " technical language" (*Gruetter* v. *Cumberland T. & T. Co.,* 181 Fed., 248, 255-6). What, then, is meant by "the record"? Is it, as the plaintiff in error seems to think, to be restricted to the pleadings only? On pp. 49-50, of the brief, plaintiff in error remarks that

"The Amended Complaint was filed by Saverio di "Giovanni Petrocelli, and contains no allegation of "his citizenship. . . . The Amended Complaint "does allege that the heirs, Giuditta di Giovanni Pe- "trocelli Spina and Assunta Spina, are residents of "the Kingdom of Italy, but not that they are citizens "or subjects thereof. . . . The heirs are the real "parties in interest, and the administrator a mere "nominal party, and their citizenship is controlling "in determining jurisdiction." But if by all this, it is sought to be contended that, in ascertaining whether diversity of citizenship exists, the pleadings alone are to be looked to, all other parts of the record being disregarded, no greater mistake could be made. As remarked in an early case, "It is true that in cases "where the jurisdiction of the courts of the United "States depends upon the character of the parties, as "it no doubt does in this, the facts upon which it "rests must somewhere appear in the record. They "need not necessarily, however, be averred in the "pleadings. It is sufficient if they are in some form "affirmatively shown by the record" (*Pittsburg, etc. Ry.* v. *Ramsey,* 89 U. S. (22 Wall.), 322—an interesting case on this subject because of its facts); and as pointed out in a late case, "It is not essential that "such diversity of citizenship be averred in the plead- "ings if it otherwise affirmatively appear in the for- "mal record. And further, it is not necessary that "the diversity of citizenship be alleged in the lan-

" guage of the statute, provided the facts appear from " which diversity of citizenship follows as a legal con- " clusion" (*Vestal* v. *Ducktown Co.,* 210 Fed., 375, 377); and the whole record, including the petition for removal was resorted to. There can, indeed, be no doubt upon this point.

In the cause at bar, the petition for removal plainly states that "the heirs" (Brief, p. 49), who "are the " real parties in interest," and whose "citizenship is " controlling in determining jurisdiction" (Brief, p. 50), were "subjects of the Kingdom of Italy" (Brief, p. 49): "the facts stated in the petition for removal " which do not conflict with anything contained in the " pleadings in the suit removed, will be taken as true " unless traversed" (*Camp* v. *Field,* 189 Fed., 285, 286); the facts of interest here, not only do not conflict with anything contained in the pleadings, but also were never traversed, as our Record demonstrates; and therefore it must be taken to be true that "the heirs" (Brief, p. 50) were "subjects of the Kingdom of Italy" (Brief, p. 49). And not only is it sufficient if the diversity of citizenship appear in the removal papers (*Ostrander* v. *Blandin,* 211 Fed., 733, 735), but non-prejudicial irregularities are not regarded as sufficient to call for a remand (*Crapsey* v. *Sun Co.,* 215 Fed., 132); and whatever the former rule may have been, the present rule is that a remand will be denied in case the question of the jurisdiction of the Federal Court is doubtful (*Drainage Dist.* v. *Chicago Ry.,*

198 Fed., 253, 264). To sum it all up, in a single sentence, where the petition for removal was sufficient to exhibit the diverse citizenship, the judgment will not be reversed because the action was not rightfully transferred (*Connell* v. *Smiley,* 156 U. S., 335). And here it may be added that it is the duty of the petitioner for the removal to file the transcript on removal (*Hatcher* v. *Wadley,* 84 Fed., 913); and that, upon removal, if the suit in the State court is in its nature an action at common law, and a pleading was duly served or filed before the removal, no repleador is necessary thereafter (*Bills* v. *N. O. etc. Ry.,* 3 Fed. Cas. No. 1309; *Dart* v. *McKenney,* 7 Id. No. 3583; *Merchants Natl. Bank* v. *Wheeler,* 17 Id. No. 9439); and the question whether a new complaint should be filed on a removal of a case from a State court is one of practice, and not the subject for which error will lie (*Aetna Ins. Co.* v. *Weide,* 76 U. S. (9 Wall.), 677).

Not only, therefore, was it wholly unnecessary for the plaintiff below to repeat in the amended complaint what had already been established by the untraversed statement of the petition for removal, but the entire procedure of removal was inaugurated by the defendant below for the benefit of the defendant below, and was carried to a successful conclusion by the defendant below. After having thus successfully removed the cause into the Federal Court; after having stipulated, subsequent to the removal (Record, pp. 15-16)

that the present plaintiff, "Saverio di Giovanni Petro-" celli, as administrator of the estate of Pietro Spina, " sometimes known as Peter Spino, deceased," be substituted as the party plaintiff in this action in the place and stead of "G. E. Nordgren as administrator of the " estate of Peter Spino, deceased"; after having likewise stipulated, subsequent to the removal, that the pending demurrer to the original complaint should be sustained, with leave to the "now plaintiff in said " action" to file an amended complaint; after having admitted service of that amended complaint (Record, p. 24); after foregoing any demurrer or plea in abatement to that amended complaint; after answering, subsequent to the removal, to the merits; after having answered this amended complaint without setting up in any way whatever the objection now made; after having, after the removal, fully recognized, both in the above mentioned stipulation, and in its answer, the identity of the parties interested under the correct names; after having gone through two trials of this cause without making any objection of this character; after having thus waived any difference in the spelling of these foreign names:—after all this, is this plaintiff in error now, in this Appellate Court, to be heard for the first time to claim that "a controversy in favor " of Jovetta Spino and Sunda Spino, as heirs of Peter " Spino" was something so vastly different from "a " controversy in favor of Giuditta di Giovanni Petro-" celli Spina and Assunta Spina as heirs of Pietro

"Spina" (Brief, p. 50), as to countenance the affectation of "a new party to the suit" (Brief, p. 50), and the pretense "that a new controversy in favor of peo-
"ple not named in the original complaint and respect-
"ing the estate of a person not named in the original
"complaint" had been "inaugurated by the filing of
"the amended complaint"? To go no further, is it permissible first to agree to and assume, in a formal stipulation (Record, pp. 15-16), a particular position in a judicial proceeding, and then to adopt a position flatly inconsistent therewith? That this cannot be done is, we think, made clear by a reading of the following authorities:

Ohio etc Ry. v. *McCarthy,* 96 U. S., 258;
Davis v. *Wakelee,* 156 Id., 680, 689-691;
Kansas etc. Co. v. *Burman,* 141 Fed., 835, 842;
The Triton, 129 Id., 698, 700.

In addition to all this, it should be pointed out to the court that no plea in abatement was filed in the present cause; and that while jurisdiction of the subject-matter cannot be conferred by consent or waiver, still objections to jurisdiction of a person, and other objections to jurisdiction which go in abatement, may be waived, and they are waived, and cannot afterwards be urged in any mode, if the defendant, without properly raising the objection, appears generally and proceeds to trial. The rule, settled by innumerable cases, is that objections as to parties or based upon

mistakes or differences of names of parties, must be raised by a plea in abatement, and if not so raised are waived; and a ground of abatement is waived by pleading to the merits. It is equally well settled that such matters in abatement cannot be urged for the first time upon appeal. These rules are so well settled that it seems almost unnecessary to quote the authorities bearing upon them, but one or two may be referred to (*Breedlove* v. *Nicolet,* 32 U. S. (7 Pet.), 413, 431; *B. & P. Ry.* v. *5th Baptist Church,* 137 Id., 568; *Monroe Cattle Co.* v. *Becker,* 147 Id., 47-58).

In addition to all this, the transcript of record in this cause at pages 15 and 16, shows a formal and deliberate stipulation entered into by the present plaintiff in error, wherein and whereby the plaintiff in error actually, knowingly and deliberately consented to the substitution of the administrator plaintiff as the party plaintiff herein, subsequent to the removal of the cause into the Federal Court. We submit that this operates an estoppel of the present plaintiff in error, in the most formal manner, to urge in this court any objection whatever based upon any assumed difference between the names Spino and Spina: we submit that this stipulation is a waiver of every objection of that kind; and we submit that it is the most convincing evidence which could be desired to substantiate the proposition that the present plaintiff in error never entertained any doubt or uncertainty concerning the identity of the deceased, or was in any way whatever

deceived, or misled, as to the identity of the man who it concedes was killed on its premises on July 1, 1912. In the face of this formal and deliberate stipulation, now to advance any argument predicated upon an assumed difference between the names SpinO and SpinA is to us like the peace of God, for it passeth all human understanding.

And here it may be added that there is respectable authority to support the proposition that where a suit is instituted in a State court by an alien (or, on his behalf,) against a non-resident of that State, and it is removed to the Federal Court by the defendant, the act of the defendant in removing the case from the State to the Federal Court constitutes a waiver of the jurisdiction of the particular court to which the case is removed:

Uhle v. *Burnham,* 42 Fed., 1;
Sherwood v. *Newport News,* 55 Id., 1;
Stalker v. *P. P. Car Co.,* 81 Id., 989;
Creigh v. *Equitable L. & A. Soc.,* 83 Id., 849;
Morris v. *Clark Const. Co.,* 140 Id., 756;
Iowa etc. Co. v. *Bliss,* 144 Id., 446;
Cucciarre v. *N. Y. Ry.,* 163 Id., 38.

And in this connection no difficulty should be experienced by reason of the view expressed in *Mahopochus* v. *Chicago Ry.,* 167 Fed., 165; because in the present case no objection was interposed by the plaintiff below to the jurisdiction of the Federal

Court. As further bearing upon the matters just discussed, we respectfully call attention to the following authorities which we believe bear upon these matters:

Bushnell v. *Kennedy,* 76 U. S. (9 Wall), 387;
Baggs v. *Martin,* 179 Id., 206;
T. & P. Ry. v. *Hill,* 237 Id., 208;
T. & P. Ry. v. *Bigger,* U. S. Adv. Ops., 1915, p. 127;
Fitzgerald etc. Co. v. *Fitzgerald,* 137 Id., 98;
St. Louis etc. Ry. Co. v. *McBride,* 141 Id., 127.

There is another technical objection presented by the present plaintiff in error in its brief, which may just as well be referred to here, because it is in a sense connected with what we have taken the liberty to describe as a quibble over the names of Spino and Spina.

Between pages 37-41 of its Brief, plaintiff in error contends that the plaintiff below made no case for the reason that he was not proved to be the administrator of the estate of the decedent; and this because the bond given by him was not as required by law, and void. The argument is that the statute requires a bond running to the State of California, whereas the bond actually given ran to the heirs—the widow and child.

But this objection was not made below, and is now presented in this Appellate Court for the first time:

it should therefore be disregarded. The solitary objection made at the trial was "that the proceed-" ings are in the estate of Peter Spino, whereas this " man's name is Pietro Spina" (Record, p. 55): no other objection was made, not even upon the motion for a nonsuit (Record, 85-6); and if the objection now urged had then been presented, it could readily have been obviated—if the objection were of any validity in a case of this kind—by giving a new bond, or under C. C. P. 1402, without unduly delaying the trial. But the objection was not made, and it is too late to originate it now (*Ross* v. *Reed,* 14 U. S. (1 Wheat.), 482; *U. S.* v. *Percheman,* 32 Id. (7 Pet.), 51; *Barrow* v. *Real,* 50 Id. (9 How.), 366; *Klein* v. *Russell,* 86 Id. (19 Wall.), 433; *Montana Ry.* v. *Warren,* 137 Id., 348; *Robinson* v. *Belt,* 187 Id., 41, 50; *Rodriquez* v. *Vivoni,* 201 Id., 371, 377). And even the objection that was really made below seems to have been abandoned, because, on p. 43 of the Brief, in another connection, we find the declaration that "it is admitted by the pleadings that " the man who died was named Pietro Spina, although " he was sometimes known as Peter Spino."

In the next place, we know of no decision that this bond was "void": certainly, none of the cases cited lay down any such rule. A bond of this type may be irregular, but it is not void: because it is the intent which controls, and it is sufficient if the intent appear, though not fully and particularly expressed.

As to the intent of the obligor, there can be no doubt: the latter half of the bond evidences that intent fully (Record, p. 82); and a technical objection should not avail to discharge a contract into which a party has voluntarily entered. If we regard as non-existent, or disregard as surplusage, the words "Giuditta Spina "and Assunta Spina," we shall then merely have a bond which has omitted expressly to designate the obligee; but such a bond would be construed with the statute requiring it: and the statute would supply the omission. Such a bond would not be delivered to "Giuditta Spina and Assunta Spina," but it would be delivered to the State of California through its representative, the County Clerk of Merced County; and so far as the sureties are concerned, while upon the one hand a court will not extend relief against them, yet on the other a court will not relieve them from a plain obligation within the intent of their bond. And so it is held that in a bond which is in fact and by its terms manifestly for the benefit of the county to which it should run, the fact that it appears to run to the State is not a variance which will be fatal (*Brown* v. *Ligon,* 92 Fed., 851). So far as an administrator is concerned, the order of time in which the act of receiving letters and the act of giving the bond are performed, does not affect the validity of his appointment, nor invalidate any act performed by him after giving the bond (*Estate of Hamilton,* 34 Cal., 464; *Pryor* v. *Downey,* 50 Id., 388; *Bowden* v. *Pierce,* 73 Id., 459): under probate statutes similar

to those of California, it is held that the administrator's failure to give a bond does not render his letters void, but only irregular or voidable (*Estate of Craigie,* 60 Pac. (Mont.), 495; *Harris* v. *Chipman,* 33 Pac. (Utah), 242); and moreover, he cannot escape responsibility, if he administer the estate, by failing to take the oath and file the bond required by law (*Harris* v. *Coates,* 69 Pac. (Idaho), 475).

In the next place, there has never been any direct attack upon the letters of this administrator: why then, is a case in which we are told by plaintiff in error that "the heirs are the real parties in interest " and the administrator a mere nominal party" (Brief, p. 50), should a collateral attack be permitted upon the letters of this "mere nominal party"? The failure, if any, to give the bond upon appointment as required by statute, does not open the door to collateral attack (*Abrook* v. *Ellis,* 6 Cal. App., 451, 454-5; *In re Wiltsey,* 109 N. W. (Iowa), 776; *Connor* v. *Paul,* 119 S. W. (Mo.), 1006; *Plemmons* v. *So. Ry.,* 52 S. E. (N. C.), 953; and note also, *In re Aldrich,* 147 Cal., 343; and see, also, the conclusiveness of the letters recognized in *Mutual, etc. Co.* v. *Tisdale,* 91 U. S., 238).

There is nothing in the cases cited in our opponent's brief which justly qualifies what has been urged above. Those cases which have been decided under other probate systems, not shown to have been similar to that in force in California, are of no consequence;

and the cases which have been cited from the California courts, appear to be cases not so much of defective, as of absent, bonds. *Staples* v. *Connor,* 79 Cal., 14, does not appear to have been a case of a defective bond open to correction, but it was a case where there was neither administrator nor bond. The point involved here was not decided there; and the case itself was criticised in *Dennis* v. *Bint,* 122 Cal., 39, 43-4, hereafter referred to. In *Ions* v. *Harbiston,* 112 Cal., 260, the administrator acted without having filed any bond whatever. It was, however, held in that case that the circumstance that the administrator did not present his bond for approval until several days after the issuance of letters to him, did not require the issuance of new letters after the bond was given. In *Dennis* v. *Bint,* above referred to, *Staples* v. *Conner, supra,* and *Pryor* v. *Downey,* 50 Cal., 388, also cited by the plaintiff in error here, were criticised; and in *Dennis* v. *Bint,* it was directly held that "if the letters issued had been duly attested, it is un- "questionable that, as against any collateral attack, "they would have been conclusive evidence of her "due qualification and of her authority to act as "administratrix" (122 Cal., p. 42).

And finally, upon this topic, we urge upon the attention of the court in its consideration of this point that:

> "It is settled by the decisions that an action of "the character authorized by section 377 of the "Code of Civil Procedure is one solely for the

"benefit of the heirs, by which they may be com-
"pensated for the pecuniary injury suffered by
"them by reason of the loss of their relative; that
"the money recovered in such an action does not
"belong to the estate, but to the heirs only, and
"that an administrator has the right to bring the
"action only because the statute authorizes him
"to do so, and that he is simply made a statutory
"trustee to recover damages for the benefit of the
"heirs."

Ruiz v. *Santa Barbara Gas Co.,* 164 Cal., 188, 191-2.

In other words, as stated in *Jones* v. *Leonardt,* 10 Cal. App., 284, 286, approved in *Ruiz* v. *Santa Barbara Gas Co., supra,* "The administrator as such has "no interest in the matter, and brings the action only "because the statute says so." We submit that this technical objection should not receive consideration.

Assignments Numbered from VII to IX.

These assignments deal with the testimony of the witnesses Knight and Salapi wherein they stated their opinion as to the manner of character of horse which Twining was driving on the day of Spina's death; and it may be said that, in the main, the testimony which these witnesses gave upon this subject-matter was not contradicted by the defendant when it placed upon the stand its own witnesses. What we are concerned with at present, however, is whether the lower court erred in admitting the testimony of these wit-

nesses upon this subject-matter. The objections which were presented to the admission of this testimony in assignments 7, 8 and 9 are the same; and for reasons which we have already discussed, we think that the objection that the testimony was "incompetent, irrelevant and immaterial," is futile, not only because too vague and general, but also because a mere "rattle "of words," as a distinguished Federal Judge described that objection (*N. Y. etc. Co.* v. *Blair,* 78 Fed., 896). The second of these objections was to the question as "calling for the conclusion of the wit- "ness," and this was followed by the further objection that no foundation was laid for the question; and these two objections may conveniently be considered together. In view of the long experience of Knight and Salapi with both horses and mules, it is difficult to understand what is meant by the statement that the question calls for the conclusion of the witness: and so far as an absence of foundation for the question is concerned, we are at a loss to understand in what respect no foundation was laid, and we are equally at a loss to determine what foundation is meant. If the term foundation has reference to knowledge of and experience with animals,—and this is all that it could have meant, then the record shows that both Knight and Salapi possessed these attributes. It appears from the record, and it so appears without slightest contradiction, that in the course of Mr. Knight's experience in farming, he has had experience

with horses and mules for 30 or 35 years, driving them, breaking them, and all kinds of experience; and that he was acquainted with the habits and manners of such animals; and that his experience covered not only mules, but also horses (38); and that Knight was an experienced and capable man, familiar with his business, an expert in his line, is established by the fact that during 20 years or more he had been employed principally by the defendant, was in the employ of the defendant in June and July, 1912, and was still in the employ of the defendant in May, 1915, when the present case was tried. Surely, if knowledge and experience with animals be the necessary foundation to enable Mr. Knight to give his opinion concerning the horse in question, we have more than sufficient here in the way of such foundation. Salapi, also, was a man of large experience with animals of this kind; and he tells us, equally without contradiction, that "I work with animals . . . I have had experi-" ence in handling mules and horses, and have handled " horses and mules in the old country, in Italy, about " five years, and also in Brazil about fourteen years, " and in California, five years" (48); and here, too, therefore, we find a sufficient foundation to authorize the plaintiff to take the opinion of this experienced man as to the type of horse which Twining was using on July 1, 1912. But the foundation for the admission of this evidence did not rest here. Knight was the foreman in charge of the harvester, and it was his

duty to take charge all over the machine, watch everything, sometimes one thing, and sometimes another (44). And Mr. Knight being on the harvester on the day of this death, saw Twining, that morning, when "he was probably a quarter of a mile away "coming from the south" (41). Mr. Knight continued to watch the boy as he approached the harvester, and had good reason for doing so. His attention was attracted to the approaching boy by the conduct of the horse that the boy was driving; and Knight gives the details of that conduct, telling us that he came up from the south between a gallop and a run, that he was twisting around some, that when he got closer to the harvester he whirled around a couple of times; "I could tell he was coming pretty fast, "he did not pursue a straight line. He was turning "coming around, kind of twisting zig-zag" (41). And in this testimony, Mr. Knight is corroborated by the testimony of Salapi, to the same effect. In other words, these two experienced men had their attention attracted to this approaching horse, and observed the acts and conduct, the speed, the twisting and zig-zaging, and the whirling around in two circles, all with their own eyes; and it certainly did not take these experienced men long to form an expert judgment as to the type and manner of animal it was which they had watched so intently while it was approaching the harvester. Knight had 30 to 35 years experience behind him in giving his testimony, and

Salapi gave his testimony in the light of some 24 years' experience in the same line: it certainly could not be said, therefore, as matter of law, that it was impossible for these men to have formed a judgment then and there, from their experience and their observation of that morning, as to the character of this animal. It nowhere appears in the testimony of Salapi whether he had or had not any antecedent knowledge of the characteristics of this animal, but it does appear from the testimony of Mr. Knight that he had never himself used the horse that Twining was driving on the day in question: he does not know whether he had ever seen it before: he states that he does not know anything about the horse whatever; and all that he knew of his own knowledge about the horse was what he saw on that morning (46); and no doubt, this portion of Knight's testimony may be resorted to in an effort to discount his evidence. But, in the first place, no man of Knight's experience would be deceived for a moment as to the characteristics of this horse, and he would be able, as he did, to appraise the animal's characteristics as soon as he saw him in action; and in the next place, after all, the passage in Mr. Knight's testimony to which we have referred, would affect merely the weight of his testimony, but would have no influence upon its admissibility. Mr. Knight's judgment was founded upon personal knowledge and personal observation of the horse on the morning in question, and in view of

his long experience with animals, he was entitled to state his opinion as to the characteristics of this horse, notwithstanding that he observed the horse in action upon but one occasion, the weight of his testimony being for the jury.

But, in addition to all of this, Mr. Knight was an expert who had the advantage of personal observation of the animal in question; and the plaintiff below was therefore entitled to take his opinion as to the characteristics of the animal in question (*Congress, etc. Co.* v. *Edgar,* 99 U. S., 645; *Walters* v. *Stacey,* 122 Ill. App., 658). And, in addition to all this, the rule of evidence is well settled that witnesses, both ordinary and expert, may testify to their opinions as to the disposition, temper and appearance of animals:

Jones, Evid., Sec. 366; 360 n. 3; 367; 382;
Makesell v. *Wabash Ry.,* 112 N. W. (Iowa), 201:

What frightened a horse;

Lynch v. *Moore,* 28 N. E. (Mass.), 277:

The habits of a horse;

Folsom v. *Ry.,* 38 Atl. (R. I.), 309:

Conduct of the animal;

Noble v. *Railway,* 57 N. W. (Mich.), 126:

Whether safe to drive.

Wilson v. *Ry.*, 29 Atl. (R. I.), 300;
Finlay v. *Ry.* 74 N. W. (Minn.), 174:

Whether driver had horse under pretty good control and seemed to drive carefully;

Yahn v. *Ottemway,* 15 N. W. (Iowa), 257:

What frightened a horse.

Sydleman v. *Beckwith,* 43 Conn., 9;
Clinton v. *Howard,* 42 Conn., 294;
Stone v. *Pendleton,* 43 Atl. (R. I.), 643.

Assignments Numbered X to XXIII.

These assignments of error deal with the complaints of the plaintiff in error against the charge to the jury of the learned Court below: there is nothing unfamiliar in this: the charge is always criticized by the party against whom the verdict is rendered; and, as usual, no attempt is made to discuss the instructions considered in their entirety, and the effort is made, by wrenching particular instructions from their context, to exhibit them as samples of incorrect law. But the fundamental rule is that instructions are to be construed and interpreted reasonably and as a whole, in the same connected way in which they are given, upon the reasonable presumption that the jury will not overlook any particular portion of the charge, but will give due weight to it as a whole; and this, of course, is quite in line with the proposition that " the jurors may be assumed to have ordinary intelli-

" gence and good sense" (*Ballou* v. *Andrews Banking Co.,* 128 Cal., 562, 567). There seems to be no reasonable doubt about the proposition that instructions are to be construed together, to the end that they may be properly understood; and if, when so construed, and as a whole, they fairly state the law applicable to the evidence, there is no reversible error in giving them, although detached sentences, or separate charges, considered alone, might be considered from the point of view of nice criticism, to have been possibly misleading. As observed by the Supreme Court of California, "The practical administration of justice should " not be defeated by a too rigid adherence to a close " and technical analysis of the instructions of the " Court. The instructions are for the enlightenment " of the jury as to the law of the case, and a jury " never enters into such character of analysis in con- " struing them" (*People* v. *Bruggy,* 93 Cal., 476, 486). Speaking upon this subject, in a case which we have already cited in another connection, the Supreme Court very properly says:

> "In examining the charge of the court, for the " purpose of ascertaining its correctness in point of " law, the whole scope and bearing of it must be " taken together. It is wholly inadmissible to take " up single and detached passages and to decide " upon them, without attending to the context or " without incorporating such qualifications and ex- " planations as naturally flow from other parts of " the instructions. *Magniac* v. *Thompson,* 7 Pet., " 348.

"Instructions given by the court at the trial are " entitled to a reasonable interpretation, and if the " proposition as stated is not erroneous, they are " not, as a general rule, to be regarded as incorrect " on account of omissions or deficiencies not " pointed out by the excepting party. *Castle* v. " *Bullard,* 23 How., 172 (64 U. S., XVI, 424).

"Appellate courts are not inclined to grant a new " trial on account of an ambiguity in the charge " to the jury, where it appears that the complain- " ing party made no effort at the trial to have the " matter explained. *Locke* v. *U. S.,* 2 Cliff., 574; " *Smith* v. *McNamara,* 4 Lans., 169.

"Requests for such a purpose may be made " at the close of the charge, to call the attention " of the judge to the supposed error, inaccuracy or " ambiguity of expression; and where nothing of " the kind is done, the judgment will not be re- " versed, unless the court is of the opinion that the " jury were misled or wrongly directed."

Congress etc. Co. v. *Edgar,* 99 U. S., 645, 659.

And so, likewise, in a more recent case, the Chief Justice remarked that "Whether the instructions " could have produced misconception in the minds " of the jury is not to be ascertained by merely con- " sidering isolated statements, but by taking into view " all the instructions given and the tendencies of the " proof in the case to which they could possibly be " applied" (*Seaboard Ry.* v. *Padgett,* 236 U. S., 668, 672).

The charge to the jury "must receive a reasonable " interpretation" (*Bliven* v. *New England Screw Co.,* 64 U. S. (23 How.), 430; *First Unitarian Society* v.

Faulkner, 91 Id., 415); and words contained in an instruction should not be subjected to "a nice criti-"cism . . . when the meaning of the instruction "is plain and obvious, and cannot mislead the jury" (*B. & P. Ry.* v. *Mackey,* 157 U. S., 72). Hypercritical niceties should be disregarded; and the language should receive a reasonable construction, in view of all the circumstances, and not a strained or forced one. It is not proper, for example, to seek after some far-fetched and unusual signification of the language used, and endeavor to base a reversal thereon: the language must be given its usual and ordinary meaning: if the language used is capable of different constructions, that one will be adopted which will lead to an affirmance of the judgment, unless it clearly appears that the jury were actually misled; and where the charge was proper in one sense, it will be presumed, on appeal, that the lower court charged in that sense.

Paschal v. *Williams,* 11 N. C., 292;
Davenport v. *Cummings,* 15 Iowa, 219;
State v. Huxford, 47 Id., 16;
Caldwell v. *N. J. Steamboat Co.,* 47 N. Y., 282;
People v. *MacCallan,* 103 Id., 587;
Looram v. *Second Avenue Ry.,* 11 N. Y. St., 652;
Harding v. *N. Y. etc. Ry.,* 36 Hun., 642.

In brief, it is a rule of general acceptance that, in construing a charge, each instruction is to be considered in connection with the entire charge; and that if, considering it as a whole, the court is satisfied that the jury was not improperly advised as to any material point in the case, the judgment will not be reversed on the ground of an erroneous instruction. Under this rule, inartificialities which render instructions open to objection when standing alone, are regarded as harmless if, when taken with other instructions, they properly state the law of negligence applicable to the case in such a way that the jury could not have been misled thereby.

McClellan v. *Burns,* 5 Colo., 390, 395;
Chicago etc. Ry v. *Roche,* 54 N. E. (Ill.), 212;
Fletcher v. *South Carolina Ry.,* 35 S. E. (S. C.), 513;
Louisville etc. Ry. v. *Hiltner,* 60 S. W. (Ky.), 21;
Grube v. *N. P. Ry.,* 11 S. W. (Mo.), 736;
Deweese v. *Mining Co.,* 54 Mo. App., 476;
Short v. *Bohle,* 64 Mo. App., 342;
Missouri etc. Ry v. *Lyons,* 53 S. W. (Tex.), 97;
Ringue v. *Oregon etc. Co.,* 75 Pac. (Ore.), 703;
St. Louis etc. Ry. v. *Hawkins,* 108 S. W. (Tex.), 736.

But, in the next place, in approaching this matter of the charge of the court below, it is proper to

point out that there can be no reversal for the refusal of requested instructions, where the record does not contain the entire charge (*N. P. Ry.* v. *Tynan,* 119 Fed., 288). The general doctrine that the judgment of the court below will be taken to be correct, that error cannot be presumed, and that before there can be any disturbance of the judgment of the court below error must affirmatively appear, is entirely applicable to the correctness of the instructions given to the jury below (*Wiggins* v. *Burkham,* 77 U. S. (10 Wall.), 129; *Corinne, etc. Co.* v. *Johnson,* 156 Id., 374); and this rule goes even to the extent that where the record does not contain all the instructions, it is to be assumed that any others needed were given (*Bennett* v. *Harkrader,* 158 U. S., 441). Since, then, the burden is on the plaintiff in error to show error affirmatively, and, to that end, to show that the record does actually contain the entire charge, and since it was easy enough to insert a recital as to the evidence and proceedings on the trial of the above-entitled cause, why was there not a similar recital attached to what purports to be the charge of the Court? The record, at the bottom of page 114 recites that the Court gave the following instructions to the jury: and these instructions purport to end at the top of page 123: but there is no recital in this record, as to this charge, similar to that which related to the evidence and proceedings on the trial. In other words, for anything that appears to the con-

trary from this record, other and additional instructions were given by the lower court to the jury: it does not appear affirmatively that the entire charge to the jury is contained in this record.

In the next place, in approaching the consideration of the charge of the Court below, it is proper to point out that requests to charge a jury upon an abstract or irrelevant matter, not properly involved in the case, are correctly refused (*White* v. *Van Horn,* 159 U. S., 3; *Hot Springs Ry.* v. *Williamson,* 136 Id., 121; *Coffin* v. *U. S.,* 162 U. S., 664; *Dwyer* v. *Dunbar,* 72 Id. (5 Wall.), 318; *Bird* v. *U. S.,* 187 Id., 118). Thus, for example, in an action to recover damages resulting from the negligence of the defendant, where "gross negligence" is not in the case, and where the defendant concedes "that plaintiff has not "charged defendant with gross negligence," instructions upon the subject-matter of gross negligence, even if we assume them to be intrinsically sound, are nevertheless abstract and irrelevant, and calculated to confuse the jury, and are therefore rightly refused. Instructions, to be given at all, must be upon points relevant to the issue in the case, otherwise they are properly refused.

In the next place, it is proper to observe that in a Federal court, a trial judge is not required specifically and directly to answer every point which may be submitted by counsel; and if the instructions given, taken as a whole, fairly present the law applicable to

the pending issue, nothing further can be required (*Salem Iron Co.* v. *Comm. Iron Co.,* 119 Fed., 593); and in doing this the trial judge is not compelled to use the language proposed by counsel, but may present the case in his own way and in his own language (*Mathieson Alkali Works* v. *Mathieson,* 150 Fed., 241, 251). As remarked by Mr. Justice Bradley:

> "Perhaps some of the abstract propositions of "the defendant's counsel contained in the instruc- "tions asked for, based on the facts assumed there- "in, if such facts were conceded, or found in a "special verdict, would be technically correct. "But a Judge is not bound to charge upon as- "sumed facts in the *ipsissima verba* of counsel, nor "to give categorical answers to a juridical cate- "chism based on such assumption. Such a course "would often mislead the jury instead of enlighten- "ing them, and is calculated rather to involve the "case in the meshes of technicality, than to pro- "mote the ends of law and justice."
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> *Continental Imp. Co.* v. *Stead,* 95 U. S., 161.

And see, also, to the same effect:

> *Ohio etc. Ry.* v. *McCarthy,* 96 Id., 258;
> *Ayers* v. *Watson,* 137 Id., 584;
> *T. & P. Ry.* v. *Cody,* 166 Id., 606;
> *Cunningham* v. *Springer,* 204 Id., 247.

Indeed, the rule is thoroughly settled in the Federal Courts that where the substance of a request for an instruction to the jury has already been given by the Court, the refusal of the Court to give it again in

different language is not error; and where the court instructs the jury in a manner sufficiently clear and sound as to the rules applicable to the case, so as to correctly guide the jury in its findings, it is not bound to give other instructions asked by counsel on the same subject, whether they are correct or not.

Chicago etc. Ry. v. *Whitton,* 80 U. S. (13 Wall), 270;
Ayers v. *Watson,* 113 Id., 594;
N. W. M. L. I. Co. v. *National Bank,* 122 Id., 501;
Anthony v. *Louisville Ry.,* 132 Id., 172;
Patrick v. *Graham,* Id., 627;
Ormsby v. *Webb,* 134 Id., 47;
Washington etc Ry. v. *McDadd,* 135 Id., 554;
Aetna L. I. Co. v. *Ward,* 140 Id., 76;
N. Y. etc. Co. v. *Winter,* 143 Id., 60;
G. T. Ry. v. *Ives,* 144 Id., 408.

Bearing these principles in mind, let us look at the instruction which is complained of in assignment No. X. This instruction was entirely hypothetical, but nevertheless was relevant to the issues presented upon the trial. It will be observed from a fair reading of the Amended Complaint in this case, that in describing the horse in question, the pleading attributes to that horse some seven characteristics: thus, it is alleged that the horse was (1) restive, (2) fractious, (3) vicious, (4) frisky, (5) not easily controlled, (6) liable

to run away, (7) a dangerous animal with which to approach the harvester: but out of all these characteristics so attributed to this animal, the plaintiff in error, with commendable prudence, seizes upon the single characteristic of viciousness, and discusses the horse as if the solitary characteristic attributed to the animal was that of viciousness. It makes no difference to the plaintiff in error that this horse is claimed by this plaintiff to have been restive: the plaintiff in error will have none of that and insists upon the favorite term "vicious." For another example, we all know that a horse may be frisky without being vicious: but no one could close his eyes more persistently to this distinction than this plaintiff in error. Again, the complaint charges that the horse in question was an animal not easily controlled, but concerning this aspect of the horse's personality, the plaintiff in error is silent, dumb and voiceless. But, not to multiply illustrations of this lopsided point of view, it may be observed that the complaint accuses this horse of liability to run away, and by consequence, a dangerous animal with which to approach an easily frightened harvester team: but it makes no difference to this plaintiff in error that the court of errors and appeals of the State of New Jersey, plainly declares that "a horse does not have to be vicious in order to run away" (*Francois* v. *Hanff*, 71 Atl., N. J., 1128): the plaintiff in error persistently shuts its eyes to every single characteristic attributed to this animal except

that of viciousness,—the motive for which is, of course, entirely transparent. The complaint urges that this animal was not easily controlled, and that it was liable to run away, which characteristics, of course, would make it a dangerous animal with which to approach an easily frightened mule team: but this plaintiff in error is wholly unable to perceive that while evidence which does not show that a horse was vicious in the sense that he was a persistent and malignant biter and kicker, may clearly and plainly establish that the horse is not easily controlled, and liable to run away, and necessarily, therefore, a dangerous animal with which to approach an easily frightened harvester mule team. Very respectable courts of good standing find no difficulty in taking in this plain proposition: but not so with this plaintiff in error. Thus, for example, the Supreme Court of the State of Illinois concedes it to be common knowledge that even tractable and gentle horses will run away when free from restraint, and that every reasonable and prudent man will take precautions to prevent such an occurrence; and in that connection, the learned court said:

> "That horses, although otherwise tractable and
> " gentle, are liable to and do run away when thus
> " freed from restraint, is a common and ordinary
> " experience, against which every reasonable and
> " prudent man takes precaution. There was noth-
> " ing extraordinary in this horse running away,
> " and it might reasonably have been anticipated.
> " No one would think it necessary to prove that

"it was an accident likely to occur; it is a mat-
"ter of common knowledge and experience."

Joliet v. *Shufelt,* 18 L. R. A., 750, 753.

In other words, to adopt the thought of the Court of Errors and Appeals of New Jersey, hereinbefore referred to, viciousness in a horse is wholly unnecessary in order to put the animal in the category of animals liable to run away, and therefore dangerous animals with which to approach an easily frightened harvester mule team; and it is this thought which, among others, gives point to our complaint that in dealing with this animal as if the solitary characteristic attributed to it were viciousness, the plaintiff in error is presenting a very one-sided view of the situation. And since it is the fact, and common knowledge, that horses which are not vicious at all, but are tractable and gentle, will run away when freed from restraint, and that every reasonable and prudent man will take precautions to prevent that occurrence, how much more care then should be taken where the animal, instead of being tractable and gentle, is spirited, high-lifed and in need of attention? And how much more care, then, should be taken when such a spirited, high-lifed horse, which needs attention, has been aroused and worked up, and excited, by being driven rapidly, between a run and a gallop, by being made to take a zig-zag course, and by being made to perform circles? And how much greater is the negligence where that degree of care is not exercised?

And here it may not improperly be pointed out that the term "vicious" as applied to an animal is in substance synonymous with the other characteristics mentioned in the complaint: the term is not limited to a malignant and evil-tempered biter or kicker; but its proper meaning is "a disposition or propensity to do an "act dangerous in its character to either persons or "property" (40 *Cyc.*, 203). Within this definition of the term "vicious" could readily be included such terms and phrases as restive, fractious, frisky, not easily controlled, liable to run away, dangerous because of capacity to frighten: because each and all of these characteristics may well be regarded as synonymous with the expression "a disposition or propensity to do "an act dangerous in its character to either persons or "property"; and therefore, to seize upon the word "vicious" as if it had some secret or mysterious meaning of a peculiarly obnoxious character, distinct from the established meaning above quoted, would be to ignore the familiar rule of construction included in the maxim *"noscitur a sociis."*

That this jury had before it ample evidence from which to make up its mind as to the various characteristics of the horse in question, is, we submit, too plain for extended argument; and it will be sufficient, we believe, to call attention to the portions of the record which deal with this particular subject-matter. Thus, Mr. Knight, the defendant's foreman, describes the horse as a high-lifed horse: he says that the animal was

"one that needs attention"; and he states that in his opinion, it was a spirited animal (Record, p. 41). Salapi tells us that "the horse in my opinion was full "of life" (Record, p. 50). Wallis, the defendant's manager, tells us that "the horse was good life" (Record, p. 88); and McSwain, another employee of the defendant, tells us that "the horse was high-lifed" (Record, p. 97). Of these witnesses, the first two were witnesses for the plaintiff, and the last two for the defendant; but all four were employes of the defendant. Knight was authorized to speak upon this subject because of his 30 or 35 years' experience with horses: Salapi was likewise authorized to speak upon this subject because of his 24 years' experience with horses. Just how intimate was the familiarity of Wallis and McSwain with horses, we are not advised by the defendant: but it does appear that McSwain had known this horse for at least six months (Record, p. 97), and Wallis claims to have known the horse for perhaps two or three years (Record, p. 88). Between Wallis and Safford, the latter another employee of the defendant, there seems to be a difference as to the length of time that the horse in question—if the horse they speak of be the horse in question—was used by the defendant: because, while Wallis claims to have known the horse for two or three years, Safford makes the claim that he knew the horse for some seven or eight years (Record, p. 92). Safford's testimony, however, is of no serious import in the case, because evi-

dently he knew, after all, little or nothing about the horse. Thus he confesses that he does not know how well bred the animal was; and as to his knowledge of the animal's characteristics, his testimony was negative, —he had no knowledge as to the animal being vicious or unmanageable; and finally he *supposes* that the horse he had in mind was the same horse that Twining was using at the time when Spina was killed (Record, pp. 93, 92).

Under all of the circumstances established in evidence, therefore, this jury had before it evidence from which it could have determined whether that horse was restive, fractious or vicious, or frisky, or not easily controlled, or liable to run away, or a dangerous animal with which to approach that easily frightened harvester mule team, or some one or more of these characteristics that entered into the situation upon which negligence is predicated by this plaintiff. And in addition to this, the jury had before them the acts and conduct of the horse and of the boy Twining as they were approaching the harvester from the South: the jury knew that Twining and his horse approached the harvester at high speed, between a gallop and a run: they knew that this approach was not made in a reasonably straight line, but that it was a course best described by the term zig-zag: they knew that as the horse and the boy approached the harvester, but before they got alongside, the boy and the horse whirled around, to use Knight's phrase, in a couple of circles;

and they knew the natural effect of these gymnastic performances in exciting and arousing the blood of a high-lifed, spirited animal that needed attention.

Bearing these considerations in mind, we can perceive the relevancy of the instruction which is complained of in Assignment Number X; and that this instruction is sound law, is apparent from the reasoning and decision in *Clowdis* v. *Fresno Flume Co.,* 118 Cal., 315; and the instruction is further supported by *Noble* v. *St. Joseph etc Ry.,* 57 N. W. (Mich.), 126, where the lower court, *inter alia,* in instructing the jury, remarked that: "In this connection, you are in-" structed that whatever the defendant's driver, Cong-" don, before this accident in question, and in the " course of his employment, learned or discovered with " respect to the character or disposition of these horses, " is presumed to have been known by the defendant, " and the defendant is chargeable with such knowl-" edge possessed by Congdon."

Finally, it will be observed that the sole ground of complaint by the defendant in error here against the instruction quoted in assignment number X is that there was "no evidence that the horse in question was "vicious": but, as we have seen, there was ample evidence before the jury from which they could reasonably have determined the disposition or propensity of this horse, as it walked alongside the harvester just prior to the runaway, to do an act dangerous in its character to either persons or property (40 *Cyc.,* 203);

and, as the sequel demonstrated, this very horse did "do an act dangerous in its character to either per-"sons or property."

The next complaint of the plaintiff in error is based upon that portion of the charge referred to in the XIth assignment of error; and the ground of complaint here is that this instruction "does not correctly "state the law applicable to said case, in this: that "it instructed the jury that if it found the plaintiff "guilty of any contributory negligence, however slight, "it must find a verdict for the defendant." Let us assume, for the sake of the argument, that there is a schism among the authorities upon the point referred to, and assuming this, how is this plaintiff in error injured? Surely, if anyone could complain of this instruction, it would have been the plaintiff below; and if ever there was an instruction given by a court to a jury which was unduly favorable to a defendant below, this is the instruction, as may be seen at a glance; but the law is thoroughly well settled that, assuming for argumentative purposes this instruction to be erroneous, still an error in the charge of the trial judge which is favorable to one of the parties is not a subject for complaint on his part; and the principle that one cannot complain of a decision favorable to himself, animates the following, among other authorities:

McLemore v. *Powel,* 25 U. S. (12 Wheaton), 554;

McMicken v. *Webb,* 47 Id., 600, 292;

Reed v. *Proprietors,* 49 Id. (8 How.), 274;
Scott v. *Sanford,* 60 Id., 19 How., 393;
Chandler v. *Von Roder,* 65 Id., 24 How., 224;
Thompson v. *Roberts,* Id., 233;
Avendano v. *Gay,* 75 U. S. (8 Wall), 376;
Wiggins v. *Burkham,* 77 Id. (10 Wall), 129;
Bethel v. *Mathews,* 80 Id., (13 Wall), 1;
Tilden v. *Blair,* 88 Id., (21 Wall), 241;
Argentine Mining Co. v. *Terrible Mining Co.,* 122 Id., 478;
Pierce v. *U. S.,* 160 Id., 355;
Ritter v. *M. L. I. Co.,* 169 Id., 139.

At page 53 and following of its brief, the plaintiff in error complains that the lower court erred in refusing to instruct the jury as to the effect of contributory negligence as laid down by the Roseberry compensation law, which, as we have already pointed out, is not in the case. It is conceded, however, that "we would " not expect this court to hold as a matter of law that " contributory negligence was proved" (p. 53): but if this be true, there was no occasion to charge on the subject of contributory negligence. But the plaintiff in error feels that "there was strong evidence in the " record of contributory negligence," and, "for the " purpose of showing the importance of the error of " the court in its instructions on this subject," reference is made on page 54, in a very slender way to some of the testimony. So far as Albano is concerned, his statement on pages 36-7 of the record was that the de-

ceased fell down; he fell down; he went off. Knight is unable to say just how Spina left the moving harvester (43, 48). Salapi tells us, at pages 50-51 of the Record, that the deceased was thrown off: again on page 51 he tells us Spino was thrown off; and finally on page 52 he reiterates that the deceased was thrown off the harvester. Wallis can, of course, contribute nothing in the way of testimony to the story of the events of July 1st: it is conceded in his testimony that he was not in the field at the time of the tragedy. He did say, however, at page 88 of the record, that the driver of the harvester "must watch his team": but this would necessitate the driver giving his attention to what was in front of him, and thus leave him in a position where he would be unable to protect himself against what was occurring behind him. The plaintiff in error makes Wallis say that "if a man falls from " the seat he will take the lines with him," and refers to page 89 of the record in support of this statement: but the record at this place does not support this statement, as it merely purports to reproduce the personal and individual experience of Wallis himself, "I always took them with me." In speaking on page 54 of the brief of Safford's testimony, plaintiff in error is constrained to admit that the straps referred to do not usually come with the harvester: but the statement is made "that Spino did not do so in this case"; and we respectfully direct attention to the fact that here, in its own brief, we find the plaintiff in error referring

to the deceased as "Spino," one of the two names that he was commonly known by. But the statement here made with reference to "Spino" is barren of authority, because the sole testimony upon the subject of the straps is contained in pages 94-5 of the record; and there Safford tells us, "I couldn't say whether the driver was tied in his seat or not." How it can be claimed that testimony of this kind supports the statement in the brief that "Spino did not do so in this case," we are quite unable to appreciate. On the same page, plaintiff in error undertakes to theorize as to what the deceased "probably" did: but we submit that what "Spino probably" did is shown by the testimony of Salapi: that is to say, "Spino" as the plaintiff in error calls him, was "thrown" from the harvester, as he might very well indeed have been, considering that "the seat has a tendency to whip about" (Safford, Record, p. 95), and considering also "the sharp turn to " the right" which Knight refers to on page 43 of the record. And finally, upon this point, plaintiff in error undertakes to say that "there is respectable authority " to the effect that in a case of this kind plaintiff must " affirmatively show that the decendent was free from " fault," and for this proposition *Gay* v. *Winter,* 34 Cal., 153, 164, is cited: but upon this proposition, we are quite content to rest upon the general doctrine of the Federal courts that in actions grounded on negligence, the plaintiff can rest on the presumption that he was without fault, until the contrary is shown by the

defendant (*Real Estate Trustees* v. *Hughes,* 172 Fed., 206). No doubt, any decision by the Supreme Court of California is a respectable authority: but as we have already pointed out, the rules concerning negligence are considered by the Federal courts to be matters of general law in which they are not concluded by individual state courts. We may add that on page 56 of the brief for plaintiff in error, it is suggested that the requested instruction was refused "under a misapprehension" as to the meaning of certain decisions, but we are unable to find the page of the record herein which justifies this statement.

The next complaint of plaintiff in error is to be found in assignment number XII:

But what relevancy this instruction had in the present cause, we must confess, that we are wholly unable to determine. The Amended Complaint in this cause exhibits an appeal to the courts for redress for the damage caused by the death of the deceased through the wrongful act of the defendant; and that appeal is made through the medium of an ordinary common law action for damages. Nowhere throughout the Amended Complaint, nowhere throughout the Answer to that complaint, is there the faintest suggestion, direct or indirect, that the present action is anything more or less than the ordinary common law action brought to recover damages for a death by wrongful act. This proceeding is so plainly not a proceeding "under the provisions of the so-called Roseberry com-

" pensation law of this State," either directly or indirectly, that we are wholly unable to perceive any rational ground upon which it could be expected that this instruction should be given. The instruction tells the jury that the plaintiff failed to prove certain matters "under the provisions of the so-called Roseberry " compensation act of this State": but the plaintiff below made no allegation, direct or indirect, of any matter or thing "under the provisions of the so-called " Roseberry compensation law of this State"; and the " so-called Roseberry compensation law of this State" was not "law applicable to the issues in said cause," to employ the language of assignment of error number XII. The Roseberry law was nowhere invoked by the plaintiff below, and was in no way relevant to any of the issues in the cause: this is simply an exhibition of the erection of a straw man for demolition purposes. But there is another reason why plaintiff in error has no just cause of complaint in this regard; and that is because the subject-matter of this instruction was substantially covered by the court below in the charge which it actually did give to the jury in the cause. There, in paragraph numbered III on page 115 of the record, the court makes it quite plain that since the plaintiff below did not rely upon any compensation law, he could not recover thereon; and the court there plainly told the jury that if the plaintiff had any redress under such laws, it must be sought by proceedings other than that at bar. So that, not only did the

instruction here referred to not fail correctly to state the law applicable to the issues in the cause, but it was in point of fact in substance given by the court to the jury in the charge actually delivered.

The next complaints of the plaintiff in error will be found in assignments of error, numbered XIII, XIV and XV; and we group these assignments of error together, because they are in a certain sense related. It will be observed that the instructions referred to in these assignments of error deal with the conduct of persons of ordinary prudence in their use of animals; and that the instruction referred to in assignment of error numbered XIV is tantamount to an admission that Twining and his horse and cart were such a means and instrumentality as was usual in the line of business of the defendant below. But the instructions here complained of were fully covered by the learned judge of the court below in his charge to the jury, and covered in a manner of which this plaintiff in error should be the last to complain. Not only is this subject-matter of the conduct of reasonably prudent men with regard to horses fully covered in the paragraph numbered V, on page 116 of the record, but also in paragraphs numbered VI and VIII, upon the same page. The paragraph numbered V was particularly favorable to the present plaintiff in error, and the same criticism is true of the paragraph numbered VI; and reading these two paragraphs together, we submit that they cover substantially the same matters which are

referred to in the assignments of error above mentioned. We think, moreover, that the mode in which this subject-matter was dealt with by the learned judge of the court below was much fairer to both sides, though leaning toward the defendant, than the instructions actually requested by the defendant below. For example, the instruction referred to in assignment of error number XV was really an argument by the defendant below, and was further infected by the vice of singling out for special emphasis a particular phase of the case. This species of instruction was condemned in *Rio Grande Ry.* v. *Leak,* 163 U. S., 280; and in *City, etc. Ry.* v. *Svedberg,* 194 Id., 201, wherein, on p. 204, Mr. Justice Harlan said that: "The court below was not bound to submit the case to "the jury in that way. It was not bound to make a "particular part of the evidence the subject of a spe- "cial instruction." This rule against singling out for special comment or emphasis, any special phase of a case, is condemned by such a multitude of state decisions that it would be the merest pedantry to attempt to cite them all: but the substance of those decisions is well reflected in the following remarks of Thompson in his monograph, entitled "Charging the Jury":

> "It is a pernicious error for the judge to single "out certain facts in evidence, and instruct the jury "with reference to those facts, while losing sight "of other material facts. Instructions ought not "only to be based upon the evidence, but upon all "the evidence. . . . The Judge may instruct

"the jury correctly and fairly in general terms, as "to the law of the case, so that, if he were to go "no further, the instructions would not be subject "to exception. But he may then entirely mislead "them by giving instructions which direct their at- "tention to prominent features in the testimony, "on one side of the case, while sinking out of view "or passing lightly over portions of the testimony "on the other side, which deserve equal attention.

"It is, therefore, a golden rule that the judge "who undertakes to present the evidence to the "jury must array before them all of the material "evidence on either side. He must not single out "isolated parts of the testimony, and instruct the "jury as to the law arising on the facts which testi- "mony tends to prove, and he must be careful not "to give undue prominence to certain portions of "it; especially, he ought not to review only those "facts which have a tendency to establish one side "of the case" (*Thompson, Charging the Jury,* pages 99, 101, 111).

And no better illustration, not merely of a singling out, but also of an argumentative singling out, could be desired than that contained in the instruction referred to in assignment number XV.

The next complaint of the plaintiff in error is to be found in assignments of error numbered XVI and XVII; and from the nature of the instructions referred to in these assignments of error, it will be convenient to consider them together. We think that the learned judge of the court below was entirely right in rejecting these instructions, for the reason, if for no other, that no instruction to a jury should be given which assumes, as a matter of fact, that which is not

conceded or established by uncontradicted proof (*Second Nat. Bank* v. *Hunt,* 78 U. S. (11 Wall), 391; *Washington etc. Railroad* v. *Gladmon,* 82 Id., (15 Wall), 401; *New Orleans Ins. Ass'n.* v. *Piggio,* 83 Id. (16 Wall), 378; *Lucas* v. *Brooks,* 85 Id. (18 Wall), 436; *Ind. Ry.* v. *Horst,* 93 Id., 291; *New Jersey etc. Co.* v. *Baker,* 94 Id., 610; *Knickerbocker etc. Co.* v. *Foley,* 105 Id., 350; *Snyder* v. *Rosenbaum,* 215 Id., 261, 265). But these requested instructions, deliberately assume the existence of a controverted fact, to-wit: "the negligence of the decedent." These instructions do not say to the jury, "If you find that the "decedent was negligent, and if you further find that "such negligence of the decedent was," etc.: if they had, other considerations would come into play; but they do not, and on the contrary baldly assume the negligence of the decedent,—a circumstance never conceded, and always contested. No fault on the part of the deceased has been exhibited anywhere in this record: he and Twining and Twining's horse were strangers: he was not employed upon the same instrumentality with Twining: his back was towards Twining; he was helpless to protect himself: he was neither expected nor required to keep what Mr. Justice Holmes calls "An impossible watch upon the rear" (*Vincent* v. *Norton etc. Ry.,* 180 Mass., 104, cited with approval in *O'Connor* v. *U. R. R.,* 168 Cal., 43, 47): even a deaf man is not required to maintain a constant watch upon the rear (*Furtado* v. *Bird,* 26 Cal.

App., 152: *O'Connor* v. *U. R. R.,* 168 Cal., 43): Spino was employed upon the harvester, and his sphere of activity was limited to the driving of his mule team, and he was entitled to rely upon the full performance of the master's duty to take proper precautions for his safety. He had, indeed, no voice in the employment of Twining, or in the selection of Twining's horse: he had no authority to govern or control Twining's management of his horse; and he was not only in a position where he could not well protect himself against negligence from behind, but he was in a position where he could have had no knowledge of the actions of Twining. In a word, there was no evidence in the cause of any contributory negligence by the deceased,—no evidence whatever: consequently no instruction on that topic was really necessary (for example, *Scott* v. *Seaboard Ry.,* 45 S. E. (S. Car.), 129): but even on the impossible hypothesis that there was, still, in order for negligence on the part of plaintiff to defeat recovery, there must be a proximate causal connection between the plaintiff's negligence, if any, and the injury: it must be such that but for this negligence the injury would not have happened: negligence, if any, on the part of the plaintiff, which in no way contributes to the injury would not prevent recovery (*Shaeffer* v. *Railroad,* 105 U. S., 249; *Ry. Co.* v. *Jones,* 95 Id., 439; *Terre Haute etc. Ry.* v. *Mannsberger,* 65 Fed., 196; *Lake Erie etc. Ry.* v. *Craig,* 73 Id., 642); and if, notwithstanding the negligence, if any, of the

plaintiff, the injury would have occurred, the defendant is liable,—the plaintiff's negligence, if any, is, in other words, no excuse if the defendant, by the use of ordinary care, could have avoided the injury (*Grand Trunk Ry.* v. *Ives,* 144 U. S., 408; *I. & S. C. Co.* v. *Tolson,* 139 Id., 551; *B. & O. Ry.* v. *Hellenthal,* 88 Fed., 116; and numerous other authorities to the same effect.

Not only are these requested instructions bad because of their bald assumption of the controverted fact of the negligence of the decedent, but they are wholly uncertain and misleading. For example, how was the jury to know what was meant by the phrase "the same "character or degree" as contained in the instruction referred to in assignment number 16, or the phrase "was equal to," which is found in the instruction referred to in assignment number XVII? Except for the purposes of misleading the jury, what value has either of these ambiguous and uncertain instructions? Moreover: Judge Thompson thus speaks of the thought which underlies the two requested instructions which we are considering: "This doctrine, which "visits upon the plaintiff or person injured, all the "consequences of the defendant's negligence, although "the plaintiff's negligence might have been slight and "trivial, and that of the defendant gross and wanton, "is cruel and wicked and shocks the ordinary sense of "justice of mankind. Such a rule finds no proper "place in an enlightened system of jurisprudence" (1

Thompson Negligence, sec. 170) ; and then, in note 8 to this section, the learned author remarks that "The "Supreme Court of Wisconsin still adheres to the "antiquated and unjuridical idea that negligence may "be divided into three degrees, slight, ordinary and "gross, and this has landed that court in the fantastic "conception that there can be no recovery where both "parties to the catastrophe were guilty of negligence "*in the same degree.*"

And again, the language of the learned Judge of the court below, in paragraph numbered 8 on pages 116, 117, and 118 of the Record, is such that the present plaintiff in error cannot have any reasonable ground for complaint because of the refusal to give the two instructions mentioned in assignments numbered XVI and XVII.

The next complaint of the plaintiff in error is contained in assignments numbered XVIII, XIX, XX and XXI. The instructions which form this group are objectionable upon several grounds. In the first place, they are not responsive to any issue in the cause: there was no such issue tendered as that of gross negligence: gross negligence was not in the case; and in the instruction referred to in assignment of error numbered XX, the plaintiff in error admits "that "plaintiff has not charged defendant with gross neg- "ligence." The instructions referred to in assignment of error XVIII, XIX and XX, are all open to

this objection: they are not relevant to the cause; and they deal with matters outside the issues. In *Chicago* v. *Robbins,* 67 U. S. (2 Black), 418, 429, a requested instruction was held properly rejected, because it did not arise out of the facts of the case, was inapplicable to them, was calculated to confuse and mislead the jury, and therefore should not have been given. And so, likewise, in *New York, etc. Co.* v. *Fraser,* 130 U. S., 611, it was said in the opinion that:

> "We do not deem it necessary to consider the "questions whether the instructions requested by "the defendant, as above set forth, and refused, "are correct, as abstract principles of law, with re- "gard to the general principles governing the "right of recoupment of damages. The bill of ex- "ceptions does not show any evidence tending to "prove all the facts which these instructions as- "sume to exist. . . . it would in our opinion "be error to give instructions applicable to evi- "dence not admitted. The legal principles in "those instructions as requested, were, so far as "they were founded upon the evidence substan- "tially put before the jury in the general charge of "the Court."

And, not to multiply authorities, in *Keyser* v. *Hitz,* 133 U. S., 138, it was held that instructions to the jury not based upon the evidence, or erroneously assuming the existence of evidence as to a special matter, are erroneous and should not be given.

But, over and above all this, these three instructions, like the two referred to in assignments numbered XV and XVII, involve "the antiquated and

"unjuridical idea that negligence may be divided "into three degrees, slight, ordinary and gross" (1 *Thompson Negligence,* sec. 170, n. 8),—an antiquated and unjuridical idea which has landed at least one court in a "fantastic conception of the law of negli- "gence." In some few jurisdictions, the civil law division of degrees of negligence is recognized, but in the great majority of jurisdictions, including the Federal Courts, it is rejected. In his great work on negligence, in section 18, Judge Thompson says:

> "I confess myself careless, ignorant and indif- "ferent upon this whole subject of the degrees of "negligence. It is plain that such refinements can "have no useful place in the practical adminis- "tration of justice. Negligence cannot be divided "into three compartments by mathematical lines. "Ordinary jurors, before whom, except in cases "in admiralty, actions grounded on negligence are "always tried, are quite incapable of understand- "ing such refinements."

And that these views are shared by federal judges, see:

The New World v. *King,* 57 U. S. (16 How), 469;
Milwaukee v. *Arms,* 91 Id., 489;
Purple v. *U. P. Ry.,* 114 Fed., 123;
Kelly v. *Malott,* 135 Id., 74.

And even in jurisdictions where negligence is distinguished into slight, ordinary and gross, it is not proper to instruct the jury as to what constitutes gross

negligence unless such fact is put in issue by the pleadings, and is supported by evidence,—which is only another way of saying that the Court in charging the jury should confine its instructions to the issues set forth in the pleadings, and that the instruction not so confined is improper although it may announce a correct proposition of law.

Bertleson v. *Chicago Ry.,* 40 N. W. (Dak.), 531;
Cincinnati Co. v. *Lewallen,* 32 S. W. (Ky.), 598;
Chicago Ry. v. *Scates,* 90 Ill., 586;
Louisville Ry. v. *Law,* 21 S. W. (Ky.), 648;
Moss v. *North Carolina Ry.,* 29 S. E. (N. C.), 410.

Upon all these grounds, therefore, we respectfully submit that the present plaintiff in error has no real cause for complaint against the action of the learned Judge of the court below, whose charge taken as a whole, fully and fairly covered the issues in the cause.

The instruction referred to in assignment of error number XXI, is bad, moreover, for the reason that it assumes a fact which was and is a controverted fact in the cause, viz: negligence of the decedent. We have already had something to say concerning this vice of assuming controverted facts in this way, and the authorities there cited are fully as applicable here.

The plaintiff in error next complains of the refusal

of the Court to give the instruction set out in assignment of error number XXII. In that instruction the jury are told that the assertion of the defense of contributory negligence is not to be taken as an admission of negligence, or as any evidence of negligence on behalf of the defendant. But as we have already seen, there is very respectable authority to support the proposition that this instruction is not good law. In the next place, the jury was very pointedly and carefully instructed that the burden of proving negligence is upon the party asserting such negligence; that before the plaintiff could recover the jury must not only find from a preponderance of all the evidence that the defendant was negligent, but also that such negligence was the proximate cause of the injury, and that the plaintiff was guilty of no negligence, however slight, contributing thereto; and that the plaintiff must show that the defendant was guilty of negligence, and that such negligence was the cause of the death of the decedent; and that if the death was accidental, and not caused by any negligent act of the defendant, the plaintiff cannot recover. And the jury were further very fully instructed concerning their province to determine the facts of the case: they were told that they could not consider as evidence statements of counsel unless made as an admission or stipulation conceding the existence of a fact: that they were not to consider as evidence or law any argument, comment or suggestion made by counsel: that they were not to consider

for any purpose any evidence offered and rejected, or which was stricken out by the court; and they were plainly told that they were "to decide this case solely " upon the evidence that has been introduced before " you, and the inferences which you may deduce there- " from, and such presumptions as the law may deduce " therefrom, as stated in these instructions, and upon " the law as given you in these instructions." In view of these instructions, and in view of the limitations which they impressed upon the function of the jury in deciding the facts, and in view also of the absence of any intimation by the Court that the pleading of contributory negligence could be taken as an admission of negligence or as evidence of negligence, it is extremely difficult for us to imagine what ground of complaint the plaintiff in error really has in this behalf. If the Court had actually instructed the jury that the fact that the defendant below pleaded the contributory negligence of the decedent could be taken by the jury as presupposing negligence on the part of the defendant, and was therefore evidentiary of such negligence,—if the lower court had actually instructed the jury that a defense of contributory negligence was really one of confession and avoidance,—we should have been prepared, upon the authorities heretofore cited, to defend such an instruction: but the lower court did not so instruct the jury, nor did the lower court even remotely intimate anything of that kind; on the contrary, the lower court clearly explained to

the jury that they were to decide the case solely upon the evidence that was introduced before them, and the inferences therefrom, within the lines laid down in the Court's instructions. Moreover, an instruction of the character referred to in assignment of error number XXII should not have been given to the jury in any event: first, because it was too general and calculated to mislead them; in the next place because it was purely argumentative; and in the next place because there was no foundation anywhere in the cause upon which such an instruction could be predicated,—that is to say, there was no evidence whatever in the cause of any contributory negligence whatever on the part of the deceased. We have already to some considerable extent discussed this matter of contributory negligence, and the suggestions there made need not here be repeated: we submit that from the beginning to the end of this trial not a scrap of evidence was presented upon either side to establish any contributory negligence whatever by the deceased; and under such circumstances, no basis for such an instruction can be discovered. Courts are not required to instruct juries upon a supposed, conjectural or hypothetical state of facts of which no evidence appears in the record (*U. S.* v. *Breitling,* 61 U. S. (20 How.), 252; *Chicago etc. Ry.* v. *Houston,* 95 Id., 697; *Haynes* v. *McLaughlin,* 135 Id., 584; *Wellington Min. Co.* v. *Fulton,* 205 Id., 60). We have already pointed out that instructions which are not based upon evidence in the

record, or which have no evidence to support them, should not be given; and when the lower court in this cause instructed the jury that the plaintiff could not recover if the evidence showed that the deceased was guilty of contributory negligence, however slight, contributing proximately to his death, we think that it fully discharged its duty in the premises, and gave to the plaintiff in error everything which it had any right to expect; and a request for an instruction to the jury which blends questions of admissibility of evidence with those pertaining to its sufficiency, should always be denied (*Columbian Ins. Co.* v. *Lawrence,* 27 U. S. (2 Peters), 25).

The next complaint of the plaintiff in error is contained in assignment of error number XXIII, which deals with the subject-matter of damages. The court very fully charged the jury as to the rule of damages in cases of this class, in paragraph 11 of the charge; and as we have seen, the court was under no obligation to adopt the phraseology of counsel upon this subject. The complaint made in this assignment of error is not that the court did not instruct the jury, as to the rule of damages, or that what he said was wrong, but merely that this particular instruction was not given: but if the court fairly advised the jury as to the rule of damages in cases of this class, it did its full duty, and the plaintiff in error has no ground for complaint. It will, of course, be remembered that in this jurisdiction, the rule of damages is fixed by statute; and

under section 377 of the Code of Civil Procedure of the State of California, when the death of a person not being a minor is caused by the wrongful act or neglect of another, either his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person: and in every such action, such damages may be given as under all the circumstances of the case may be just. This statute has been the subject of discussion and interpretation by the Supreme Court of California; and the instruction which the learned judge of the court below gave to the jury in this cause was based upon this statute and the decisions construing it, including *Crabbe* v. *Mammoth Mining Co.,* 168 Cal., 500. The decisions of the highest state court under the statute giving a right of action for death by wrongful act, are binding upon the federal courts and this doctrine has been specifically declared with respect to the question of damages (*Quinette* v. *Bisso,* 136 Fed., 825, *certiorari* denied in 199 U. S., 606; *Louisville, etc. Ry. Co.* v. *Lansford,* 102 Fed., 62: *Jacobs* v. *Glucose Sugar Refining Co.,* 140 Id., 766); and in a case, in which the jury were distinctly informed that they were to follow the rule of damages announced by the state court in an action to recover damages for the death of the plaintiff's testator, caused by the wrongful act and omission by the defendant, the Supreme Court affirmed

the judgment, and held that the action of the lower court in respect of this matter was not ground of error (*Roseville etc. Ry.* v. *Clark,* 152 U. S., 230; and see also, *Hastings Lumber Co.* v. *Garland,* 115 Fed., 19; *S. P. Co.* v. *Hall,* 100 Id., 765). The learned judge of the court below was therefore quite correct in the instruction which he gave to the jury on this subject: it fully, fairly and correctly stated the law applicable to the subject-matter; and the plaintiff in error has no reasonable ground for complaint in this behalf. It may be added that where no error of law appears, the verdict is conclusive in respect of the amount of damages.

S. P. Co. v. *Maloney,* 136 Fed., 171;
Ill. Central Ry. v. *Davies,* 146 Id., 247;
Nelson v. *Bank,* 156 Id., 161.

The foregoing observations, we respectfully submit, sufficiently dispose of what plaintiff in error has to say on pages 57-8 of its brief on the subject-matter of damages. That the defendant below is dissatisfied with the amount of damages awarded, that it is the province of the jury to assess the damages in cases of this class, that their verdict will not be set aside simply because it is excessive (if it be so) in the mind of the court, but only when such excess is shocking to sound judgment and fariness (*Paauhau S. P. Co.* v. *Palapala,* 127 Fed., 920, 928-9: not a death case), and that even where the verdict is considered excessive,

a remission of a part of the damages may be directed, are all rules so thoroughly understood that we do not consider it necessary to cite authorities in support of them.

The next complaint of the plaintiff in error is contained in assignments of error numbered XXIV and XXV, the first of these dealing with the action of the lower court in denying the motion of the defendant below for a nonsuit, and the second of these dealing with the action of the lower court in denying the motion of the defendant below to instruct the jury to render a verdict in favor of the defendant and against the plaintiff. We have had occasion already to refer in an earlier portion of this brief to these assignments of error, and there set forth the grounds and the authorities upon which, in our opinion, these assignments of error were bad and should not be considered by this court. We wish to add to what was there suggested the statement, which the record here fully supports, that any exception to the action of the lower court in either of the respects mentioned was waived when the defendant below introduced evidence upon its own behalf. This, we think, of itself, would be a perfect answer to these two assignments of error: the rule is thoroughly established in the federal courts that a defendant's exception to the denial of a motion for a nonsuit, or of a motion for the direction of the verdict is waived by the offer or introduction of testimony or evidence in support of the defense (*Silsby*

v. *Foote,* 55 U. S. (14 How.), 218; *N. P. Ry.* v. *Mears,* 123 Id., 710; *Union Ins. Co.* v. *Smith,* 124 Id., 405; *Bogk* v. *Gassert,* 149 Id., 17; *Wilson* v. *Stock Co.,* 153 Id., 39; *Runkle* v. *Burnham,* Id., 216; *Hanson* v. *Boyd,* 161 Id., 397; *McCabe Const. Co.* v. *Wilson,* 209 Id., 275).

The XXVIth assignment of error formulates the complaint of plaintiff in error that the evidence is insufficient to justify the verdict. Certain particulars are set forth in which it is claimed that the evidence is insufficient to justify the verdict: there are eighteen of these particulars; but no one of them attempts or purports to specify wherein or how or why the evidence is insufficient to justify any finding of the jury; and all that we are confronted with is the undraped assertion that the evidence is insufficient to justify this, that or the other finding. Independently, however, of the generality and indefiniteness of these so-called particulars, we think that the complaint here made is wholly unjustified by the state of the record. It will be convenient to consider together the first, second and eighteenth of these alleged particulars, which deal with the subject-matter of parties, so to speak. We submit that these particulars are not justified by the record in this cause. The entire course of decision in the State of California under section 377 of the Code of Civil Procedure, from *Monroe* v. *Dredging Co.,* 84 Cal., 515, through *Ruiz* v. *Santa Barbara Gas Co.,* 164 Cal., 188, and down to *Crabbe* v. *Mammoth Mining*

Co., 168 Cal., 500, makes it clear that an action of this character could not be brought except on behalf of the estate or heirs of the deceased; who are "the real parties in interest" (Brief of Plaintiff in Error, p. 50), and for whose sole benefit the action is brought, the money recovered being no part of the estate of the deceased (*Ruiz* v. *S. B. Gas Co., supra*); and when the jury in this cause, after listening to the probate record (Record, p. 55-84), and after listening to the testimony of the widow of the deceased (Record, p. 85) found a verdict in favor of the plaintiff, this question was settled. The claim that the evidence was insufficient to justify a finding that the plaintiff prosecutes the action for or on behalf of the wife or minor daughter of the decedent (assignment XXVI, particular 18), is covered by the suggestions which we have just made; and the claim made in particular number 2 to the effect that the evidence is insufficient to show that Spina left any heirs, or that he left the wife and child referred to in the Amended Complaint herein, is fully met, not only by the testimony of the widow, not only by the failure of the defendant below to assign any such ground upon its motion for a nonsuit, not only by the uncontested assertion of plaintiff's counsel in the colloquy with the court on pages 84 and 103-4 of the record, but also by the utter and complete absence of any contradiction, contest or controversy upon these points during the trial below. The widow testified plainly that she and the deceased were married in Italy

some thirteen years prior to the time of her testimony: that he was 36 years old, while she was 31 years old; that he supported her during his lifetime: that she recently came from Italy to California; and that she had one child, Assunta, who would be 10 years old on the 15th of August, 1915. This testimony is not only uncontradicted, but was given under the following circumstances:

> "THE COURT—And any children in the case?
> "MR. DUNNE—Yes, sir. I propose to call the widow now and prove those facts by her.
> "MR. TREADWELL—She testified before. I am perfectly willing to let her testimony go in as it is.
> "MR. DUNNE—That will save the necessity of calling her. By consent of counsel, I will read in evidence to you gentlemen, the testimony of the widow, as given upon the former trial which reads as follows" (Record, p. 84).

Upon the whole we therefore respectfully submit that the complaint made as to these three particulars numbers 1, 2 and 18, is not well founded.

The next particulars to attract attention are those numbered 3, 14 and 16. These so-called particulars are extremely general and indefinite in character: they wholly fail to specify wherein, or how, or why in the directions mentioned, the evidence is insufficient to justify the findings of the jury; and all that they amount to is a general declaration that the evidence is insufficient to justify the finding that the deceased came to his death through the negligence of the de-

fendant. Such a statement as this, we submit, is entirely too vague and general to be considered. We have already discussed the rules pertinent to matters of this kind, and in the light of those rules have to some considerable extent reviewed the facts in the case as developed on the trial; and we submit that the only fair conclusion to be drawn therefrom is that the deceased came to his death through the negligence of the defendant, that the cause of action sued upon is based upon that negligence, and that in that negligence Twining and his high-lifed, spirited horse, which needed attention, was the prominent factor. There can be no doubt upon the admissions in the pleadings and the proof upon the trial that Twining and his horse and cart was an instrumentality of the defendant regularly employed in its business for the purpose of keeping a record of the products of its grain fields, and that in the course of that employment, Twining used a horse which was furnished him by the defendant below; and since negligence is the inference or conclusion which practical judgment draws from a number of constitutive facts, and since the record in this cause contains the constitutive facts from which that inference may be drawn, it follows that it cannot be said that the verdict of the jury was unsupported by evidence, or that the evidence was insufficient to justify the finding of negligence.

The particulars numbered 4, 5 and 15 may be considered together, because of their dealing with the

same subject-matter. We have already quite fully discussed the condition of the evidence relative to this subject-matter and have pointed out with clearness, we hope, that there was evidence before the jury from which it could have found that the horse was fractious, frisky, not easily controlled, liable to run away, dangerous because of capacity to frighten, or a dangerous animal with which to approach an easily frightened harvester team. We think that a fair reading of the record in the cause will satisfy any candid person that these particulars of this assignment of error are not entitled to serious consideration.

Plaintiff in error, at p. 19-21 of its brief, refers to the testimony of Wallis, Safford, McSwain, Knight and Salapi: the first three of these were defendant's witnesses, while the last two were produced by the plaintiff who had the verdict: great prominence and precedence are accorded the witnesses whose theories the jury rejected, while but scant notice is taken of those upon whose testimony the jury founded its verdict; and while 12 lines of space are devoted to Wallis, and 12 lines to Safford, and 17 to McSwain, yet but a shade over 3 are given to Knight, and but 2½ to Salapi. But the undue prominence thus given to the three witnesses for the side against which the jury decided, cannot conceal the inherent weakness of their testimony, or impeach the good judgment of the jury in rejecting their views: their testimony was quite negative: Wallis "never heard of its (the horse) being

"vicious" (Brief, p. 19)—neither did the Emperor of Japan: Safford "never knew of its being vicious or "unmanageable or anything of that kind" (Brief, p. 20)—neither did the Governor of North Carolina: McSwain "never knew anything vicious or unmanage- "able about the horse" (Brief, 20)—neither did General Joffre; and of what value is alleged testimony of this kind? Wallis, the Superintendent, really knew nothing about the horse, "because we have so many "horses" (Record, 88): Safford, another employee of defendant, can only "suppose it is the same horse" (Record, 92), "I do not know how well bred she was" (*Id.*, 93), "I don't remember ever using the horse my- "self" (*Id.*), "there are lots of horses on the farm, and "I don't remember ever driving this one" (*Id.*); and McSwain, who knew the horse six months (Record, 97), after conceding the horse to be "high-life," expresses the dubious opinion that *"I don't think* she "would run away" (*Id.*), although "of course to start with, she shied a little bit, it didn't amount to any- "thing" (*Id.*). We submit that testimony of this type is of no value, and the jury rightly declined to be influenced by it: ordinarily a witness like Knight or Salapi who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten: "the testimony in "the one case is positive, in the other case it is nega- "tive, and both statements may be true"; and not only does this negative testimony fail to qualify the affirma-

tive testimony of Wallis that the horse was "good life" and of McSwain that it was "high life," not only does it fail to meet the affirmative testimony of Knight and Salapi, but it also fails to meet their accepted testimony as to the exciting conduct of the horse while being driven towards the harvester just before the death (*Stitt* v. *Huidekopers,* 84 U. S. (17 Wall.) 384, 394: *Aetna L. I. Co.* v. *Ward,* 140 *Id.* 76: *Paauhau S. P. Co.* v. *Palapala,* 127 Fed., 920, 925: *Aetna L. I. Co.* v. *Davey,* 40 *Id.,* 911: *Chicago, etc., Ry.* v. *Andrews,* 130 *Id.,* 65: *Del., etc., Ry.* v. *Devore,* 122 *Id.,* 995: *B. & O. Ry.* v. *Baldwin,* 144 *Id.,* 53: *The Fin MacCool,* 147 *Id.,* 123).

The particulars numbered from 6 to 12, inclusive, may likewise be considered together, because they deal with the conduct of Twining. This subject-matter has likewise been heretofore very fully discussed, and that discussion need not be repeated. We wish, however, respectfully to insist that Twining and his horse and cart was a constituent element in the place where the deceased was required to do his work; and we respectfully insist that this boy of 16½ years, and his horse and cart, were an instrumentality for the conduct of the defendant's operations. The following references to the record will serve, we think, to make this clear:

Amended Complaint, paragraph IV: Record page 20, line 26, to page 21, line 12.
Albano: Record page 36, lines 7-8.

Id. page 37, lines 3-5.
Knight: Record page 44, lines 12-16.
Salapi: Record page 54, line 22, to page 55, line 1.
Twining: Record page 99, lines 7-15.

It is thus plain that Twining was an instrumentality of the defendant's business, and an instrumentality which was part and parcel of the place and situation in which the decedent was compelled to do his work.

Singer Mfg. Co. v. *Rahn,* 132 U. S., 518;
Nooney v. *Pacific Express Co.,* 208 Fed., 274.

In its brief, between pages 21 and 30, plaintiff in error advances the proposition that "there was no evidence that Twining was negligent in the handling or control of the horse,"—a contention which, we submit, is fully answered by our review of the facts. In this connection, reference is made to *Rowe* v. *Such,* 134 Cal., 573, but we shall have something to say of that case when we discuss the authorities cited by plaintiff in error. The suggestion is also made at p. 22 "that Twining did everything possible to control the horse"; and after quoting a portion of Albano's testimony, the claim is made that Twining "had such "control of the lines that *when the horse started to* "*run,* and before it got past the machine, he was "holding the horse pretty strong, with his arms ex- "tended their full length" (page 23). But this claim cannot endure analysis. No warrant can be found in

Albano's testimony for any claim that Twining had any control of the lines whatever "when the horse started to run": on the contrary, Albano plainly declares, "I did not notice when the horse and cart first began to run—not when they started" (Record, p. 37). Nor can any justification for this claim be found in the testimony of Knight, because he plainly tells us, at p. 48 of the Record, "I did not see Mr. "Twining or his horse at the time that it started to "run, and I don't know what it was started Mr. "Twining's horse to run. His horse started the team "to run." That Twining was in the cart both before and after "the horse started to run" is apparent in the testimony: but whether "when the horse started to run," he "had such control" as is claimed here, cannot be determined from the testimony of either Albano or Knight. What Twining's conduct was "when the horse started to run" is established by the testimony of Salapi,—testimony supported by every fact and fair inference in the case, corroborated in many material particulars even by Twining, and accepted by the jury that rejected Twining's version. Of what utility, then, to refer to those portions of the testimony of Albano and Salapi as to what Twining was doing *after* the horse had commenced to run? What Twining was doing or trying to do, *after* the horse had started to run, throws but very little light upon the facts and circumstances constitutive of the starting to run itself; and indeed, the only inference

to be drawn from Twining's conduct, after the horse had started to run, was that he was endeavoring to hold the horse, because of his consciousness that he had done a most negligent thing in permitting the horse to start to run. At the time when Albano and Salapi saw Twining with his arms outstretched holding the horse, the horse had already started to run: the starting to run was already an accomplished fact, and past history; and this may be illustrated by the testimony of Albano, on cross-examination, where he stated, "I did not notice when the horse and cart first began to run—not when they started."

In other words, the duty of Twining to exercise care in the management of his horse and cart was not limited to the exact instant of danger to the person of another, without reference to whether Twining observed care before that instant to avoid injuring such other: on the contrary, it was Twining's duty, reasonably, and in due time, to observe precautions to avoid injuring any other person in the field: it was his duty to be on the alert to avoid danger; and he should not have delayed taking precautions until too late to avoid injury. Twining's efforts to restrain the horse, if he made any efforts to restrain the animal, made after the horse had started to run, were what judges and text-writers call efforts *in extremis* and therefore useless: the real duty of Twining was not so much to seek to restrain the horse after the horse had started to run away, but to have originally pre-

vented the horse from running away at all. And therefore, the testimony of Albano, as quoted in defendant's brief, does not touch the question as to whether Twining was or was not careless in originally permitting the horse to start to run.

At p. 27 of its Brief, plaintiff in error, speaking of the testimony of Salapi, uses the phrase "taking this testimony at its face value, and disregarding any conflict between it and his previous testimony": but as to this observation we have but brief remarks to make. In the first place, there was no conflict whatever between his testimony as given upon the two trials: the testimony on the second trial was naturally more full than on the first, but there was no conflict. In the second place, if there was any conflict in his testimony, it was for the jury to resolve that conflict, and this they did in favor of the plaintiff below. And in the third place, as the learned judge told the jury below, they were "the sole judges of the effect and value of the evidence" (Record, 120); and the jury believed Salapi and disbelieved Twining in all particulars where Twining differed from Salapi, and found for the plaintiff.

Great prominence is then given on pages 28-9 to the testimony of the witness whose version the jury declined to accept; and at the top of p. 30, the astonishing statement is made that "it will be seen "that this version of the matter is not materially "different from the combined version of the other

"witnesses." We respectfully submit that a critical analysis of the testimony will establish that upon many features of the case a most material difference exists; and in this regard we need not refer to more than the unnecessary excitement into which the high-lifed, spirited animal that needed attention was plunged while zigzagging across the field, or the loosely hanging reins, or the distraction of attention from the horse in front to Trainor at the side, or the talk and gesticulation, or other aspects of the situation that will readily suggest themselves.

Particular numbered 13 deals with the claim that the evidence is insufficient to justify the finding that the defendant negligently failed to supply the decedent with a safe place to work: but there was evidence before the jury sufficient to justify them in finding that the defendant negligently failed to supply the decedent with a safe place to work. If the claim be that the harvester was a standard harvester, equipped with brakes and a crew, that the harvester team could be controlled with the lines, and that it was impossible for the team to run any great distance if the brakes were set, then we beg leave to point out that this alleged impossibility is a purely theoretical impossibility which is fully answered by the concrete facts proven in this cause as to the distance which the mule team actually did run upon being frightened: if the brakes were set, these facts show that the brakes were wholly inefficient to pre-

vent the runaway; and if the brakes were not set, then the harvester was unsafe for another reason—because inefficiently manned and handled. It is not entirely clear that the driver could assert any control over any brake sufficient of itself to stop the harvester under such circumstances as are delineated in this cause: but even though such were the fact, still we know that Trainor, the sack sewer, at the time when the runaway started, was not in any position where he could handle any brake,—a condition of things in which the deceased had no voice, and over which he had no control. The safe place to work rule applies to the instrumentalities with which the work is done and the immediate surroundings of the work (*Myers* v. *Pittsburg Coal Co.,* 233 U. S., 184; *Choctaw, etc. Ry.* v. *McDade,* 191 Id., 64; *N. P. Ry.* v. *Peterson,* 162 Id., 346; *U. P. Ry.* v. *O'Brien,* 161 Id., 451); and where the mode of doing the work is careless, the place is not a safe place to work (*Hennessy* v. *Bingham,* 125 Cal., 627): in the case last cited, the Supreme Court of California used this language:

> "If the employer has failed to use ordinary care
> " in the mode of doing the work, and, therefore,
> " injury has resulted, he has failed to provide a
> " safe place for the workingmen to do their work,
> " and has subjected them to unusual risks, which
> " they did not assume by accepting the employ-
> " ment, unless they knew of the unusual risks. In
> " such case the neglect of the employer in respect
> " to duties which he cannot avoid by putting them
> " upon a co-employee, has contributed to the in-
> " jury, and he is responsible."

We have already pointed out that Twining and his horse and cart were an instrumentality for the conduct of the defendant's operations; and in that behalf, we have referred to the record and to the authorities supporting that proposition; and we have pointed out that this instrumentality was a part and parcel of the place and situation in which the decedent was compelled to do his work: but, if there were nothing more to be said, the negligent conduct of the defendant in sending this inexperienced slip of a boy, in charge of a strange, unfamiliar, high-lifed, spirited animal, which needed attention, into dangerous proximity to an easily frightened mule team, and the careless conduct of that boy in letting the lines slip while his attention was distracted from the horse to Trainor, after he had stirred up this spirited animal by running or galloping and zig-zags and circles, made that place the death trap that was disclosed by the subsequent events; and it would be no answer to this claim to urge that at other and prior times, the harvester had been operated by the driver without accident,—"that circumstance is only "a matter of wonderment, and is an instance of how "long good luck will sometimes protect carelessness "for long periods" (*Monahan* v. *Pac. Rolling Mill,* 81 Cal., 190, 193; *Hennessy* v. *Bingham,* 125 Cal., 627, 633: the *Nordfarer,* 115 Fed., 416). Whether this harvester was a standard harvester, whether it was a usual or customary harvester, by no means

exhausts the situation in the midst of which Spino was placed with his back turned to the source and origin of the disastrous consequences which followed: because, whether this harvester was a usual or customary harvester or not, neither this defendant nor any other person can hide behind what is usual or customary in an effort to evade the duty cast upon it by law to adopt and maintain reasonable and proper precautions to furnish its employees with a safe place in which to do their work. We do not understand that a custom or usage can be invoked to justify a negligent act: we think that such evidence would be an attempt to excuse the defendant's negligence by showing a custom to be equally negligent. But nowhere in this record can any credible evidence be found to establish the proposition that whether a harvester, considered purely *qua* harvester, be a usual harvester or not, it is either usual or customary to commit a strange and spirited animal to the custody of an inexperienced stripling, and then send that stripling with that unfamiliar and high-lifed animal into an unfamiliar locality that he had visited only once before, and into dangerous proximity with an easily frightened mule team; and we think that if this sort of thing be usual or customary, then the quicker those engaged in such occupations alter their customs, the better it will be for them, and the greater the protection which will be afforded to the lives and limbs of innocent men.

Why, in other words, raise a false issue about every other element making up the existing situation, except the real vital one? Why argue, for example, about the harvester being all right, and its crew all right, and these mules all right, but overlook this further constituent instrumentality and ignore the conduct of the defendant in sending that boy out there to that field under the circumstances disclosed? Why set up this straw man merely to knock him down again? No evidence was produced by the plaintiff to the effect that the harvester and crew were not all right: nor did the plaintiff claim that President Wilson was not concerned with European and Mexican troubles: but what have these things to do with the special questions here? Were not those mules liable to fright? Was not that horse a strange animal to Twining, of whose disposition the boy was ignorant, and which he was then using for the first time? Was not that cart a little two-wheeled thing without brakes? Was not Twining a mere slip of a boy?

We say that those mules were liable to fright; and we are told, if you please, that this harvester was a usual model. We say that Twining's horse was a strange and unfamiliar animal to him, which he should have taken no chances with; and we are told, if you please, that the harvester crew was all right. We say that the cart was a little two-wheeled thing without brakes; and we are told, if you please, that the driver of the harvester is provided with a place

to support his feet. We say that Twining was a heedless boy; and we are told, if you please, that the harvester was fitted with brakes. We say that Twining and his horse and cart were a glaring menace to the lives of the men upon that harvester; and we are told, if you please, that Peter Piper picked a peck of pickled peppers. In a word, it is our claim, and the jury approved it, that Twining and his horse and cart were not all right, and that this particular instrumentality of the defendant's business was not handled with that care and prudence which would be suggested by the slightest conscious obligation to avoid injury or death to one's fellowman.

The last of these alleged particulars included within assignment number XXVI, is that the evidence is insufficient to justify a finding that by reason of the negligence of the defendant, the plaintiff has been damaged in the sum of $5000, or any sum. But this alleged particular, likewise, will not withstand analysis. The record shows that at the time of his death, Spina was a comparatively young man: he was only 36 years of age; and his expectancy of life was 31 years and 7/100. His wife was then a woman 31 years of age and her expectancy of life was 34 years and 63/100 (pp. 84-5). The proof shows that at the time of his death, Spina was earning "$3.00 a day and his board, working 26 days a month" (record, p. 39): in other words, he was earning $78 per month and his board. It appears from the testimony of the

widow, at page 85 of the record, that she was dependent upon her husband's earnings for her support: she tells us that her husband supported her during his lifetime, and she adds, "just all I got was just whatever my husband used to send me" (record, p. 85). And obviously by this tragedy her sole source of support was taken from her and she and the child were left quite penniless. For this bereavement, we believe that she is entitled to compensation: The underlying principle is that where one person derives pecuniary benefit from the continued life of another, the untimely termination of that life presumes pecuniary injury (6 *Thompson, negligence,* sec. 7050); and we submit that the amount at which the jury estimated the damages is an amount which, while on the one hand it was not vindictive, still on the other hand, it was just and righteous in view of a full and fair consideration of all of the circumstances of this case. Under our statute, the jury in cases of this class, may give such damages as under all of the circumstances of the case may be just (*C. C. P.,* sec. 377), and we think that this course was pursued in the cause at bar.

The last of these alleged "particulars" is the general objection that the jury returned a verdict in favor of plaintiff: no claim is made in this assignment of error No. 27, that this verdict was "then and there" duly excepted to: on the contrary, the statement is that the verdict was "thereafter" duly excepted to;

and the fact is, as shown by the bill of exceptions (Record, p. 131) that the verdict of the jury was not at all excepted to at the time. Consistently with our contention heretofore made, we repeat that an assignment of error cannot be utilized for the purpose of supplying deficiencies in the record below, or for the purpose of importing into the case some new matter or some additional exception.

AUTHORITIES CITED BY PLAINTIFF IN ERROR.

The authorities cited by plaintiff in error on pages 30-35 of its brief are not relevant to the special facts and circumstances of this particular case.

Reference is made to *Rowe* v. *Such*, 134 Cal., 573, and the opinion of Judge Farrington in the cause at bar, filed July 13, 1914. But the most which can be extracted from *Rowe* v. *Such* is that the naked fact of a runaway, in and of itself, standing alone, and uncomplicated by any other fact or circumstance, does not raise a presumption of negligence. And in considering the value or lack of value of *Rowe* v. *Such* as an authority in a cause presenting such features as are presented by the cause at bar, it is proper to point out that the courts of the United States are not controlled, upon questions of negligence, by the views entertained by any particular state. Questions relating to negligence causing personal injuries, are, in the absence of statute, usually regarded as questions of general law as to which the federal courts are

not concluded by the decisions of the state courts; and it is needless to add that in the State of California, no statute has been enacted governing this subject-matter of runaway horses. Questions relating to negligence, except as qualified by an actual statute, are regarded as questions of general law as to which the federal courts will follow their own independent judgment, irrespective of the decision of the state court. This rule has been applied, for example, to the duty to furnish proper appliances (*Gardner* v. *Michigan Ry.,* 150 U. S., 349), to the doctrine of *res ipsa loquitur* (*Montbriend* v. *Chicago etc. Ry.,* 191 Fed., 988) to negligence in relation to minor employes (*Force* v. *Standard Silk Co.,* 160 Fed., 992, 179 Fed., 184), to the delegation of duties (*Hough* v. *T. & P. Ry.,* 100 U. S., 213, 225), to the duty to employ competent co-workers (*Wabash Ry.* v. *McDaniels,* 107 U. S., 454); and generally, to other aspects of the law of negligence. The illustrations given will suffice, we hope, to illustrate a rule about which there can be no dispute.

In view of this rule, this court is not bound by the ruling of the Supreme Court of the State in *Rowe* v. *Such,* 134 Cal., 573, limited as the scope of that case is, but this court is free to apply to the facts and circumstances, in evidence here, its own conceptions of the correct legal rule to be applied. And if this court should feel that the instrumentality in question was under the exclusive control of Twining, and that

horses do not, in the ordinary course of things, run away without some inattention or carelessness on the part of those supposed to be in control of them, and that if Twining had been reasonably careful in his management of the animal to retain over it, when alongside the harvester, the proper control, and that these considerations authorized an inference of negligence calling for explanation by the defendant, there is nothing whatever in any state court decision to prohibit this court from taking that view.

But between *Rowe* v. *Such* and the cause at bar, upon the facts, the widest divergencies exist. That was an action by an executrix to recover for the death of the testator caused from being struck by a wagon drawn by a runaway horse. The transaction occurred in Van Ness Avenue, one of the streets of the City of San Francisco. There was more than one defendant in the action; and the claim of the appellant was that she had made out a *prima facie* case against the defendant, Nelson, under whose management and control the wagon had been driven by his driver, Baumert, prior to the accident. In that case, it was conceded that the horse ran away because of some unexplained cause: as remarked by the court: *"there is absolutely no evidence pointing to negligence on the part of the driver.* When he was first seen he was in the air and falling from his seat to the ground. *Whether he lost control of his horse through negligence is not shown, nor does any fact appear*

from which negligence could be inferred" (page 575). It would appear from the report that, so far as the *res gestae* were concerned, there were but two witnesses whose attention was attracted by some one crying out, and who, on looking in the direction of the cry, saw the wagon coming. One of these witnesses testified that the driver was in the air and sat down on the ground, the horse ran away and the man jumped up and ran after him. He said that the horse was going toward Van Ness, the driver fell off or got off opposite the door of an armory in Ellis Street. This witness testified that the driver was in the air when he saw him between the seat and the ground: he was off the seat: the horse was not going very fast then: the driver ran after the horse: the horse then ran: by that time the reins were dangling around the horse's feet: the horse then ran so fast that he did not want to try to stop him. It appears that the horse while in Van Ness Avenue collided with the deceased, who was so severely hurt that he died shortly afterward. There was no claim that there was any contributory negligence on the part of the deceased. This appears to be the whole of the case of *Rowe* v. *Such.*

From all that appears from the report of *Rowe* v. *Such,* the incident there related may very well have been an isolated incident in the life of the driver in question. There was no fact in that case "from which negligence could be inferred." The report discloses

nothing about the youth or age of the driver of the wagon; nor does it exhibit any previous warning to or reprimand of that driver, because of his careless method. In the case at bar, we are not only confronted by the driver who was a mere youth, not shown to have been experienced in the management of animals, but we are also confronted by a driver whose heedlessness at a prior occurrence furnished the occasion through which the proof was made of notice to the master of the extreme danger of approaching a mule team from the rear. There was nothing in *Rowe* v. *Such,* to show that the horse there driven was a different and strange animal substituted for the animal in use antecedently: but in the cause at bar we have the fact that this youthful driver, not shown to be skilled in the management of animals, whose carelessness called for a reprimand from the foreman only three days before, drove for the first time an animal which, as the record shows, was a different animal from the one in use three days before and was a high-life, spirited animal that "needed attention." In *Rowe* v. *Such,* speaking of the driver, the court said that: "whether he lost control of his horse through negligence is not shown"; but in the cause at bar, there can be no doubt, upon Salapi's testimony, if nothing else, that Twining did carelessly lose control over the horse by permitting the lines to fall while his attention was distracted to Trainor. And since there is no proof that the harvester itself, or Trainor, or Knight

or Albano, or Salapi started Twining's horse to run, the only cause adequate to produce that result was Twining's failure to continue to exercise control over the horse:—the only inference which the facts in the cause at bar permit is that after Twining had reached the harvester, he lost control of his horse through that very inadvertence which, as we have seen, is of the essence of negligence. If the horse were unruly, liable to run away and dangerous with which to approach the mule team from behind, the master would be liable for the consequences: but if, on the other hand, as counsel contends, the horse was not unruly, or liable to run away, or a dangerous animal, then, why did not Twining continue to control him after he had reached the harvester? If Twining were exercising the same care, prudence and control that the law requires, and if neither the harvester nor any of its crew startled that horse, why did the horse run? What other inference was open to the jury as practical men, except that Twining exhibited the inadvertence of a youth, and carelessly permitted the horse to run? And in other respects, hereafter to be noted, there are divergencies between *Rowe* v. *Such* and the cause at bar. It should be added, also, at this point, that the Chief Justice dissented in *Rowe* v. *Such,* holding that the case made by the plaintiff "was clearly one for the jury."

But the authority of *Rowe* v. *Such,* even in the State of California, has been qualified by later cases.

Rowe v. *Such* dealt, if it dealt with anything at all, with the naked fact of a runaway: but in examining the authorities bearing upon this subject-matter, it is to be kept in mind, that even if the bare fact, without more, that the horse ran away, would not, in itself, standing alone, be sufficient to make out a *prima facie* case of negligence, rendering it incumbent upon the defendant to produce exculpatory evidence, yet, that fact, in connection with the circumstances attending the transaction, might very well, in a particular case, have that effect, even in the absence of any direct evidence of negligence. And this thought may well be illustrated by the recent case of *Bauhofer* v. *Crawford,* 16 Cal. App., 676. That was a case where a milkman was engaged in pouring milk from a large can on his wagon into another when the defendant, driving an automobile, collided with the wagon, and by so doing, injured the plaintiff. When the plaintiff rested, the lower court nonsuited him, but on appeal, this action by the trial court was reversed. The Appellate Court held that the driver of a vehicle should proceed carefully and be on the alert lest he collide with others; and the Appellate Court applied to the situation there in hand the doctrine of *res ipsa loquitur.* In discussing *Rowe* v. *Such,* the Appellate Court declared the effect of that case to be that no presumption of negligence arose from the mere fact that the horse ran away, but pointed out that in the case before it, "we cannot reasonably

attribute the accident to the carelessness of a third person,"—any more than in this present cause, we can attribute the starting of Twining's horse to the carelessness of any third person, or to any fright caused by the harvester; and the Appellate Court held that, "it would seem that the accident must "have resulted from the negligence of the defendant "and not from that of some third person. We there- "fore think that this is a case for the application of a "rule *res ipsa loquitur* and also of the principle that "he who has peculiarly within his power the means "of producing evidence of reasonable care shall be "required to do so" (page 680). This remark of the Appellate Court to the effect that "he who has "peculiarly within his power the means of producing "evidence of reasonable care, shall be required to "do so," operates a very distinct qualification of *Rowe* v. *Such.* In *Rowe* v. *Such,* the driver of the horse was named Baumert, and he was employed under the management and control of the defendant, Nelson: Baumert was Nelson's driver: Baumert was Nelson's employe: the horse and wagon belonged to Nelson, and Nelson was Baumert's employer; and the report of the case states that, "the driver of the "horse was not called by plaintiff as a witness, and "there was no evidence as to what caused the horse "to run away" (134 Cal., 574). But if, as the re- port of *Rowe* v. *Such* makes clear, Baumert were Nelson's employe and subordinate, and if, as the re-

port shows also, he were the person in charge of the horse and wagon at the time when the horse started to run away, then, he would be the person "who has peculiarly within his power the means of producing evidence of reasonable care," and he is the person who should be required to do so; but the plaintiff ought not to be put to the risk of resting his recovery upon the testimony of the guilty party." (*Breidenbach* v. *McCormick Co.,* 20 Cal. App., 184, 189); and the plaintiff who was suing Nelson along with the rest, should not have been expected to call as a witness the driver of the horse who was Nelson's employe, and working under his management and control. And so, in the later case, of *Breidenbach* v. *McCormick Co.,* 20 Cal. App., 184, expression is given to views which materially curtail the asserted universality of *Rowe* v. *Such.* There, the learned appellate court said:

> "The responsibility of the owner of a horse for "an injury committed by it begins at the moment "the owner takes the horse from its stall. He is "presumed to know how he handled the horse, "what he did with it and when and how it es- "caped from him, if it runs away. It may be that "the only witness to the cause of the runaway was "the owner or driver. The horse may have started "because left unhitched; or it may have taken "fright from some defect in hitching it to the "wagon, or from the wagon itself, or from some "part of the harness giving away or from some "object at the roadside, or from careless driving, "or from some other of the numerous causes of

" runaways. It would be an exceptional case of a " runaway in which the driver or owner could not " explain the case. But the plaintiff ought not to " be put to the risk of resting his recovery upon " the testimony of the guilty party. The rule laid " down in *Judson* v. *Giant Powder Co.,* 107 Cal., " 556 (48 Am. St. Rep., 146, 29 L. R. A., 718, 40 " Pac., 1021), was as follows: 'When a thing " which causes the injury is shown to be under the " management of the defendant, and the accident " is such as in the ordinary course of things does " not happen if those who have the management " use the proper care, it affords reasonable evi- " dence, in the absence of explanation by the de- " fendant, that the accident arose from the want " of care.' "

Breidenbach v. *McCormick Co.,* 20 Cal. App., 184, 193.

In this case, also, *Rowe* v. *Such* was *distinguished,* the appellate court using the following language:

"It was held by the Supreme Court, in *Rowe* v. " *Such,* 134 Cal., 573 (66 Pac., 862, 67 Pac., 760, " that the rule in the Giant Powder Company case " did not apply to the facts in the Rowe case. In " that case, which is relied upon by appellants, the " horse was not unattended; the driver was on the " wagon at the time the horse started to run and " he was thrown off the wagon. There was no " evidence showing fault of the driver. All the " facts were before the jury and there was nothing " shown from which negligence could be imputed " to the driver. Hence the rule had no applica- " tion. But whether this particular rule should " apply or not, we think that, under the circum- " stances here appearing, there was sufficient evi-

" dence of negligence to call for an explanation by " the defendants and that the court erred in grant- " ing the motion for nonsuit."

And here, we have a very distinct declaration, that the fact of the runaway, when taken in connection with the various facts and circumstances appearing in the instant case, would have the effect of making out a *prima facie* case of negligence, rendering it incumbent upon the defendant to produce exculpatory evidence even in the absence of any direct evidence of negligence. And in the course of the discussion by the appellate court of the cases bearing upon this question, the court observed that "the plaintiff, in our opinion, was not called upon to make any explanation of the cause of the runaway, but that this duty devolved upon defendants." And it may be added that a petition to have *Breidenbach* v. *McCormick Co.* heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on December 20, 1912, (20 Cal. App., 193). *It is also to be observed that in cases of this character, it is well to bear in mind that whether in the particular jurisdiction the bare fact that a horse ran away is or is not, sufficient prima facie evidence of negligence, still, very little in the way of attending circumstances may, in any given case, be ample to give foundation for an inference of negligence.*

Breidenbach v. *McCormick Co.,* 20 Cal. App., 184, and authorities therein cited.

The foregoing criticism of *Rowe* v. *Such,* is not dissented from in the opinion of Judge Farrington: for, there, we find the language that "in *Rowe* v. *Such,* 134 Cal., 573, the cause of the runaway did not appear." In this opinion of Judge Farrington, after stating the case, and quoting the allegations of negligence in the complaint, the learned judge uses the following most significant language:

> "This leaves no basis for any presumption that "Twining negligently caused or negligently per- "mitted his horse to run by the mules. The negli- "gence, if there were any, occurred before or at "the time he lost control of the horse, and as to "what happened then, there is no testimony."

This is the central thought and the essence of Judge Farrington's decision. But in the case as presented upon the second trial, the defect which existed at the former trial was remedied by the testimony of Salapi, which testimony was fully corroborated by that of Knight, and to a very large extent by that of Twining. This testimony the jury accepted, as they had a perfect right to do; and it is, we respectfully submit, far more than enough to support and sustain the present verdict.

On page 16 of the brief for plaintiff in error, after citing the Clowdis case, reference is made to the Reed case, 51 A. S. R., 62: but in that case there was neither allegation nor proof of viciousness: she relied solely upon the ground that the horse was left

near the sidewalk, unattended; and hence, "viciousness" was not in the case, and any reference to it was sheer *obiter dictum.* In the case of *Hollyburton,* 38 L. R. A., 156, the horse was alleged to be "wild and dangerous and untrained"; but there was no evidence whatever in support of this allegation. In the *Eddy* case, 105 A. S. R., 897, we find a state of facts somewhat similar to those in the Reed case, *supra*: here, as there, the horse was rightfully in the street: here, the horse kicked, as there the horse bit: a verdict was directed for the defendant; and after detailing the facts, the appellate court said (page 899):

> "Under such circumstances the defendant, *in "the absence of testimony showing negligence in "management of the horse while in the street,* "would not be liable."

The case of *Coughlin,* 121 A. S. R., 158, cited on page 16 of the brief, was a case of leaving a horse in a street carefully fastened in the usual way; and it was held that this was not negligence, the court admitting, however, that one "must use ordinary care and prudence in fastening or restraining the same (horse) so as to prevent injuries" (page 163-4).

The *Fallon* case, reported in 34 A. R., 713, was a Rhode Island decision wherein the court agreed that a horse may be dangerous although not vicious: in that case the court said that if, while driving the horse harnessed, it had escaped from control *without negligence on the driver's part,* and running away

had injured the plaintiff, the defendant would not be liable: but we submit it to be a fair inference from this language, that if the horse had escaped from control by reason of negligence on the driver's part, the defendant would be liable. We cannot quite grasp the reason why the *Lynch* case in 104 A. S. R., 958, or the *Phillips* case in 11 Id., 458, should be cited: we fail to perceive their relevancy to the present cause. The *Billes* case in 91 A. S. R., 429, was that of a quiet and gentle horse: there was no evidence in that cause to sustain the inference that the horse in question was a high-lifed, spirited animal which needed attention, nor was there any evidence in that case to justify the inference that just before the fatal accident occurred, such a high-lifed, spirited animal had been excited and aroused and had its blood quickened by traveling at a rapid pace between a run and a gallop across a field, accompanied by zig-zags and circles; and in that case the court properly conceded that the disposition and temper of the horse should be considered upon an issue as to negligence. The *Kimball* case, 35 L. R. A., N. S., 148, deals solely with a runaway team; and in the *Creamer* case, 73 A. S. R., 186, cited on page 17 of the brief, the horse had previously been gentle and easily managed, and there was not a particle of evidence to show any negligence. The *Bennett* case, 47 Ind., 264, merely holds that in the absence of negligence, no liability attaches.

Crocker v. *Knickerbocker Ice Co.,* 92 N. Y., 652, cited on page 18 of the brief, concedes that drivers "must use proper care and prudence so as not to cause injury to other persons lawfully upon the streets"; and the court held that "there was no proof in this "case, or at least not sufficient proof for submission "to the jury *that the team was driven carelessly or* "*that the driver was negligent.*" *O'Brien* v. *Miller,* 25 A. S. R., 320, was a case wherein the court conceded that "the driver was exercising the highest care to prevent injury." In *Nilan* v. *Gas. Co.,* 1 N. Y., A. D., 234, there was no proof of negligence: in *Button* v. *Frink,* 50 A. R., it was held that no presumption of negligence arose from the bald fact that the horse ran away. In *Keck* v. *Sanford,* 2 Misc. (N. Y.), 484, there was no proof of negligence; and the same criticism is true of *Robinson* v. *Bletcher,* 15 Up. Can., Q. B., 159; and so likewise in *Brown* v. *Heather,* 8 U. S. Can. L. J., N. S., 86.

It should be added here that in the charge of the court below to the jury in this cause, the present plaintiff in error received the full benefit of *Rowe* v. *Such* (Record, p. 116, Par. 7); and that throughout the foregoing citation of authorities, Federal Decisions are conspicuous by their absence.

SUCCESSIVE VERDICTS.

It is a general rule that except in very extraordinary cases, a new trial will not be granted after successive verdicts have been rendered in favor of the same party to an action.

Milliken v. *Ross,* 9 Fed., 855;
Johnson v. *N. P. Ry.,* 46 Id., 347;
Joyce v. *Charleston Ice Co.,* 50 Id., 371; 54 Id., 332;
Linss v. *Chesapeake Ry.,* 91 Id., 964;
Clark v. *Barney Dumping Co.,* 109 Id., 235; 112 Id., 921;
Eaton v. *S. P. Co.,* 22 Cal. App., 461;
Carr v. *Am. Loco. Wks.,* Ann. Cas., 1912 B, 131 and note.

Upon the whole, we respectfully submit that the case is a meritorious one, that it was fairly tried below, that the present plaintiff in error has no real ground for complaint herein, and that the judgment should be affirmed.

Respectfully submitted.

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